TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~234~~ 40.

NORTHERN ASSURANCE COMPANY OF LONDON, PLAINTIFF IN ERROR,

vs.

GRAND VIEW BUILDING ASSOCIATION.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED JUNE 7, 1905.

(19,793.)

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SUPREME COURT OF THE UNITED STATES.

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No. 291.

NORTHERN ASSURANCE COMPANY OF LONDON, PLAINTIFF IN ERROR,

vs.

GRAND VIEW BUILDING ASSOCIATION.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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1 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the supreme court of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Nebraska before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Grand View Building Association, plaintiff and appellee, and Northern Assurance Company of London, defendant and appellant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Northern Assurance Company of London as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days of the date hereof,

2 that the record and proceedings aforesaid being inspected, the Supreme Court may cause to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 25th day of May, in the year of our Lord one thousand nine hundred and five.

Issued at office in the city of Omaha, with the seal of the circuit court of the United States for the district of Nebraska on date aforesaid.

[Seal United States Circuit Court, District of Nebraska.]

GEO. H. THUMMEL,
Clerk Circuit Court of the United States
for the District of Nebraska.

Allowed by
SILAS A. HOLCOMB,
Chief Justice of the Supreme Court of Nebraska.

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3 STATE OF NEBRASKA, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled cause together with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of the supreme court of the State of Nebraska, at the city of Lincoln, this 25th day of May, 1905.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of the Supreme Court of Nebraska.
By VICTOR SEYMOUR, *Deputy.*

[Endorsed:] Supreme court of Nebraska. Filed May 25, 1905. H. C. Lindsay, clerk.

3½ [Endorsed:] 13617. Grand View Bldg. Ass'n v. Northern Assurance Company. Writ of error. Supreme court of Nebraska. Filed May 25, 1905. H. C. Lindsay, clerk.

4 UNITED STATES OF AMERICA, ss:

To Grand View Building Association, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of Nebraska, wherein Northern Assurance Company of London is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Silas A. Holcomb, chief justice of the supreme court of Nebraska, this 25th day of May, in the year of our Lord one thousand nine hundred and five.

SILAS A. HOLCOMB,
Chief Justice of the Supreme Court of Nebraska.

Service of this citation is accepted this 25th day of May, 1905.
HALLECK F. ROSE,
WILMER B. COMSTOCK,
Attorneys for Grand View Building Association.

4½ [Endorsed:] 13617. Northern Assurance Company of London, plaintiff in error, v. Grand View Building Association, defendant in error. Citation Supreme court of Nebraska Filed May 25 1905 H. C. Lindsay clerk.

5 GRAND VIEW BUILDING ASSOCIATION *v.* NORTHERN ASSURANCE COMPANY OF LONDON. *No.* 13617.

Plea before the supreme court of the State of Nebraska, at a term thereof begun and holden at the capitol, in the city if Lincoln, in said State, on the 3rd day of January, A. D. 1905.

Present: Hon. Silas A. Holcomb, chief justice. Hon. H. G. Sedgwick, judge. Hon. John B. Barnes, judge.
Attest: HARRY C. LINDSAY, *Clerk.*

Be it remembered, that on the 8th day of February, A. D. 1904, there was filed in the office of the clerk of said supreme court a certain assignment of errors in the words and figures following, to-wit:

Supreme Court of Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Appellee, *v.* NORTHERN ASSURANCE COMPANY OF LONDON, Appellant. } Assignment of Errors.

Comes now the Northern Assurance Company of London, appellant, and makes the following statement of errors appearing
6 upon the record filed herein:

I.

There is no competent evidence in this case which establishes any agreement upon the part of defendant and appellant to issue its policy of insurance to be concurrent with and additional to other insurance then covering the property insured and the third finding of fact is not sustained by sufficient evidence.

II.

The sixth finding of fact herein in so far as the same finds that the policy of defendant and appellant was in force on June 1, 1898, is not sustained by sufficient evidence and is the statement of an erroneous legal conclusion and not of a fact.

III.

The eighth finding of fact is not sustained by sufficient evidence for there is no competent proof that the agent of defendant and appellant by mistake failed to insert in the policy issued by him consent to concurrent insurance upon the property insured.

IV.

The eleventh finding of fact is not sustained by sufficient evidence nor any evidence and is an untrue recital of the theory and effect of the decision of the United States Supreme Court therein referred to.

V.

The court erred in admitting over the objections and exceptions of the defendant and appellant the testimony of H. J. Walsh taken upon a former trial between the parties hereto.

7 VI.

The court erred in overruling the motion of defendant and appellant to strike out the answer of the witness Bert Richards to the 48th interrogatory shown on page 13 of the bill of exceptions.

VII.

The court erred in admitting the testimony of H. J. Walsh covered by paragraphs 111 to 125 of the bill of exceptions tending to prove an oral contract with reference to concurrent insurance upon the property covered by the policy issued by defendant.

VIII.

The judgment of the district court should have been for the defendant and appellant for the plaintiff's cause of action is barred by the statute of limitations and the second conclusion of law contained in the decree herein is erroneous.

IX.

The judgment of the district court should have been for the defendant because the testimony does not establish that there was any agreement between the representative of the plaintiff and the agent of the defendant that consent to concurrent insurance should be endorsed upon the policy issued by defendant's agent and that the defendant's agent either by fraud or through mistake omitted to make such endorsement thereon.

X.

The judgment of the district court should have been for the defendant and the judgment of this court must be for the defendant and appellant; because the issues between the parties hereto
8 have been litigated in an action originally begun in the district court of Lancaster county, Nebraska, which was removed from that court to the United States circuit court for the district of Nebraska and from there taken to the United States circuit court of appeals for the eighth circuit and from thence to the Supreme Court

of the United States; and the judgment of the United States Supreme Court and the decree of the United States circuit court for the district of Nebraska pursuant to the opinion and judgment of the United States Supreme Court, was, that upon the facts in that suit, which are identical with those in this case, the defendant is not liable. The defendant pleaded said judgment in bar in the district court in this suit and claimed there and claims here the benefit and protection of said judgment and opinion of the United States Supreme Court and of the judgment of the United States circuit court for the district of Nebraska pursuant thereto.

XI.

The district court erred in rendering judgment for the plaintiff and appellee and against the defendant and appellant because the plaintiff and appellee elected to pursue its remedy in the Federal court against this defendant with full knowledge of the facts herein found and having litigated said cause in that forum it cannot now be permitted, under guise of a different form of action to relitigate the question there adjudicated.

XII.

The district court erred in permitting this cause to proceed to trial and decree therein without requiring the plaintiff to pay the
9 balance of the unpaid costs amounting to $400.88 adjudged against it in the former litigation between the parties hereto which terminated in a judgment in defendant's favor in the United States circuit court for the district of Nebraska.

XIII.

The district court erred in rendering judgment for the plaintiff and appellee against the defendant and appellant for the reason that the court had no jurisdiction to render a decree the only effect of which is to establish of record an item of evidence within the power of plaintiff and appellee to adduce under the rule of law and practice hitherto in vogue in this State by oral testimony.

Wherefore defendant and appellant prays for a re-trial of said cause upon the record herein filed and a re-examination of all the questions therein presented pursuant to the statute in that behalf made and provided, and for a reversal of the said judgment of the district court, and for a decree herein dismissing the plaintiff's petition and for costs of suit.

GREENE BRECKENRIDGE & KINSLER,
Attorneys for Defendant and Appellant.

Endorsed: 13617. Supreme court of Nebraska. Grand View Building Ass'n. Appellee v. Northern Assurance Co. of London, appellant. Assignment of errors. Supreme court of Nebraska.

Filed Feb. 8 1904. Lee Herdman clerk. Greene, Beckenridge & Kinsler, attorneys for appellant.

10 And afterwards, on the same day, to-wit: the 8th day of February, A. D. 1904, there was filed in the office of the clerk of said Supreme Court a certain transcript, in the words and figures following, to-wit:

11 *Transcript.*

Pleas in the district court, third judicial district of Nebraska, in and for Lancaster county, at the September A. D. 1903 term of said court, begun and held at the city of Lincoln in said county and State on the 17th day of September, in the year of our Lord one thousand nine hundred three; and on a day therein to-wit, on the 9th day of November A. D. 1903 (that being the 39th judicial day of the September A. D. 1903 term of said court) present Honorable Edward P. Holmes, judge presiding; Z. S. Branson, sheriff and W. C. Phillips, clerk; the following proceedings were had and done to-wit:

Be it remembered, that at the several times hereinafter set forth, were filed in the office of the clerk of said court, papers, of which the following are true and complete copies and proceedings were had and done in the cause below named as follows:—

Petition.

In the District Court of Lancaster County, Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
THE NORTHERN ASSURANCE COMPANY OF LONDON, Defendant. } Petition.

The plaintiff complains of the defendant, and for cause of action says:

12 1. Plaintiff is a corporation, organized under the laws of Nebraska. The defendant is a corporation, incorporated under the laws of the Kingdom of Great Britain and Ireland with power to insure property in the State of Nebraska against loss or damage by fire.

2. On the 31st day of December, 1896, plaintiff was owner of certain household and kitchen furniture and other articles of personal property, situate in the three-story brick and stone building, with slate roof, on lot F. in Grand View Residence Park addition in Lancaster county, Nebraska, occupied as a boy's military and boarding academy, which said personal property was of the value of more than $4,000. The said property on said day was insured against loss or damage by fire in the sum of $1500 only, under a policy theretofore procured by plaintiff and issued by the Fireman's Fund Insurance

Company, incorporated under the laws of California, which insurance was then subsisting and remained in force to and including the date of the destruction of said goods by fire, as heretofore alleged.

On said December 31, 1896, the plaintiff applied to the defendant for further and additional insurance in the sum of $2500 upon said personal property, to be concurrent with the aforesaid insurance under-written by the Fireman's Fund Insurance Company, and then and there informed defendant of the said subsisting insurance of $1500 in said Fireman's Fund Insurance Company theretofore written by plaintiff thereon.

Said application was made orally by plaintiff's president, H. J. Walsh, and the defendant, by its duly authorized agent, A. D. Borgelt, accepted such application for said insurance of $2500 to be additional and concurrent with the subsisting insurance of $1500 aforesaid, and for a term of two years and for a premium rate then and there agreed upon between plaintiff and defendant of $33.75. Plaintiff duly paid to the defendant the sum of $33.75 for the premium so agreed upon for said insurance of $2500 for the term of two years, and thereupon, and in consideration of the pay-
13 ment of such premium, the defendant made and delivered to plaintiff a policy of insurance on said property a true copy whereof is hereto attached and made a part of this petition, marked Exhibit A, by the terms whereof defendant insured plaintiff for the term of two years from the 31st day of December, 1896, at noon, to the 31st day of December, 1898, at noon, against all direct loss or damage by fire, to an amount not exceeding $2500, to all of the aforesaid property, while so located, said property was in said policy referred to and described in the words following:

"Nothing on the three-story brick and stone building with slate roof, and its additions, including foundations and all fixtures and attachments of every description belonging to said building while occupied for dwelling purposes only, situated on lot F. in Grand View Residence Park addition (referring to an addition to the city of Lincoln, in Lancaster county, Nebraska,) occupied as a boy military and boarding academy.

"$2500.00 on household and kitchen furniture of every description, useful or ornamental, bedding, family wearing apparel, watches and jewelry in use, plate and plated ware, musical instruments, sewing machine, printed books and music, pictures, paintings, engravings and mirrors, and their frames (at not exceeding cost), amateur photographic outfit, billiard tables, trunks, garden tools and implements, screens, fuel and family stores, all while contained in the above described building."

3. On or about the first day of June, 1898, during the term of said insurance, and while said policy was in full force, the aforesaid property of plaintiff, covered by said insurance, and all thereof, was burned and wholly destroyed by fire, and such fire was not caused by any act or neglect of the plaintiff.

4. On or about the 26th day of July, 1898, within sixty days

from date of said fire, the plaintiff rendered and delivered to defendant a statement, signed and sworn to by its president, giving all the particulars of said fire and of its loss and damage thereby sustained, by the terms of said policy required, which the defendant accepted and still retains, and plaintiff on its part has complied with all the conditions of said policy.

5. The plaintiff was owner of said property when so destroyed by fire, and the same was then of the value of more than $4000.

14 6. The said policy was executed on defendant's behalf by one A. D. Borgelt, who at the said time was the general agent of defendant in charge of its office and business in the city of Lincoln, Nebraska, where defendant kept a record and register of the policies written and risks by it assumed, and in whose hands the defendant placed supplies, including blank policies, endorsements and riders, and said Borgelt then had authority from defendants to accept fire insurance risks for and on defendant's behalf, and to countersign and issue its policies of insurance and to collect, receive and receipt for premiums, and to provide by endorsements upon or added to said policies for the consent of defendant to the writing and carrying of other insurance thereon.

7. Notwithstanding the premises, and that it was the intention of both plaintiff and defendant that said policy should by its terms permit the plaintiff to carry concurrent insurance in the sum of $1,500, the said policy in the form so executed and delivered, by mistake both of plaintiff and defendant, failed to provide for the carrying of concurrent insurance and the plaintiff accepted the same and retained said policy without discovering the said omission and error, until after the loss of the said property by fire, plaintiff further says, in the alternative that it should be found there was no such mistake on defendants part and that the policy, as issued, was in the form by it intended, then and in such case, the omission to so provide for concurrent insurance was wholly through mistake and inadvertance on the part of the plaintiff, and by fraud practiced on the part of the defendant, in that the defendant's said agent Borgelt had knowledge beforehand of the existence of said $1,500 insurance, and that the application for said insurance was made with intention that the defendant's policy of $2,500 should be concurrent therewith and in addition thereto, and said agent, with knowledge of said fact, which was duly reported to him by the plaintiff, accepted the said insurance premium of $33.75 and delivered

15 said policy, knowing that the plaintiff and defendant had agreed that the said insurance should be additional and was intended by the plaintiff to be concurrent with the other insurance mentioned, and not otherwise, and by reason of the premises and accepting and retaining of said insurance premium by said agent, with knowledge of said insurance so previously written, and the acceptance of the risk thereon and the issuing and delivering of said policy, with full knowledge thereof, and with knowledge that plaintiff had ordered and purchased the said policy to be concurrent with

said former insurance and of the plaintiff's acceptance of said policy in faith thereof, the defendant is estopped and concluded to deny that said policy was intended to bear an endorsement signed by said agent, permitting the plaintiff to carry additional concurrent insurance in the sum of $1,500.

8. By reason of the aforesaid error and mistake, whereby the said written policy failed to express the contract of the parties, the plaintiff is and has been since the date of said loss, unable to enforce said policy, because of a condition contained in the printed portion thereof in the words following:

"This entire policy, unless otherwise provided by agreement endorsed thereon or added thereto, shall be void, if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." And plaintiff is without any remedy at law and is remediless except by the intervention of the court of equity to correct and reform said written policy by its decree, by adding thereto, in compliance with said stipulation for an agreement to be endorsed thereon or added thereto in accordance with the agreement actually made between plaintiff and defendant, the words following: "Consent is hereby given to additional insurance in the sum of $1,500 to be concurrent herewith."

9. Plaintiff says that by reason of all the premises, there became due to it upon said contract, by reason of the loss of said property, as before stated, upon the 26th day of July, 1898, the sum of $2,000, and the said sum, with interest thereon from said July 26, 1898, is now due and payable from defendant to plaintiff. Plaintiff expressly remits and releases any and all claim against defendant on account of the premises in excess of the said principal sum of $2,000. Said sum is wholly unpaid.

16-27 The plaintiff, therefore, prays that said insurance policy may be reformed as aforesaid and that upon such reformation the plaintiff have judgment thereon for the sum of $2,000, together with interest thereon from the 26th day of July, 1898, the damages so by it sustained, and for costs of suit.

HALLECK F. ROSE AND
WILMER B. COMSTOCK,
Attorneys for Plaintiff.

STATE OF NEBRASKA,
Lancaster County, } ss:

Halleck F. Rose, being first duly sworn, on oath deposes and says; the plaintiff above named is a corporation and I am its duly authorized attorney in this suit, and I believe the facts stated in the foregoing petition are true.

HALLECK F. ROSE.

Subscribed in my presence and sworn to before me this 20th day of January, 1903.

JOHN A. RANDALL,
Notary Public.

[SEAL.]

* * * * * * *

28 Endorsed: 30–206—District court, Lancaster county, Nebraska—Grand View Bldg. Association, plaintiff—*vs*—The Northern Assurance Company of London, defendant.—Petition—Clerk's office district court, Lancaster county, Nebraska—Filed Jan–21–1903—W. C. Phillips, clerk district court.

Motion to Strike Out Part of Plaintiff's Petition.

District Court, Lancaster County, Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff, *vs.* NORTHERN ASSURANCE COMPANY OF London, Defendant.	Motion to Strike Out Part of Plaintiff's Petition.

Comes now the defendant The Northern Assurance Company of London, by its attorneys Greene, Breckenridge & Kinsler, and shows unto the court that this suit is brought to reform a policy of fire insurance upon the alleged ground of mutual mistake of plain-
29 tiff and defendant, that paragraph seven of plaintiff's petition contains an alternative allegation anticipating defendants denial of the existence of the mistake relied on to secure reformation of said policy, that the issuance of the policy in the form in which plaintiff received it was because of defendants fraud in said particulars in the petition set forth, and defendant, therefore, moves to strike out all of paragraph seven beginning with the words: "Plaintiff further says, in the alternative that it should be found there was no such mistake on defendant's part that the policy, as issued, was in the form by it intended, then and in such case, the omission to so provide for concurrent insurance was wholly through mistake and inadvertance on the part of the plaintiff, and by fraud practiced on the part of the defendant", etc., as scandalous, irrelevant and impertinent.

GREENE, BRECKENRIDGE & KINSLER,
Attorneys for Defendant.

Endorsed: 30–206 District court, Lancaster county, Nebraska—Grand View Building Association, pl'ff—*v.*—Northern Assurance Company of London, def't—Motion to strike out part of plaintiff's petition.—Clerk's office district court, Lancaster county, Nebraska—Filed Feb. 10—1903 W. C. Phillips, clerk district court

Journal Entry.

That on the 23rd day of May A. D. 1903 (that being the 15th judicial day of the May A. D. 1903 term of said court) were had and done the following proceedings as appear upon court journal "43" page 403 to-wit:

GRAND VIEW BUILDING ASSOCIATION
vs.
THE NORTHERN ASSURANCE COMPANY OF LONDON. } 30–206.

This cause now comes on to be heard upon the motion of the defendant to strike out part of the petition herein and is
30 submitted to the court, on due consideration thereof the court doeth overrule said motion, to which the said defendant duly excepts, and leave is hereby given the defendant to further plead within twenty days from this date.

Motion.

In District Court, Lancaster County, Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, Defendant. }

Motion for an Order on Plaintiff to Show Cause why Costs of Former Suit Should not be Paid or this Cause Dismissed.

Comes now the defendant and showing unto the court that in a former suit between the parties hereto brought by the above named plaintiff against this defendant upon the identical policy in suit involved in this action, certain proceedings were had resulting in a judgment against the plaintiff in favor of the defendant and for costs of suit, upon which there is a balance due of $400.88 and which the plaintiff refuses to pay; defendant moves that the plaintiff pay said costs by a date to be fixed by this court or show cause why said costs are not paid, and that otherwise this suit stand dismissed.

In support of this motion, the affidavit of R. W. Breckenridge is submitted herewith.

GREENE, BRECKENRIDGE & KINSLER.

Endorsed: 30–206 District court, Lancaster county, Nebraska—Grand View Bldg., Ass'n.—*vs.*—Northern Assurance Company of London, England.—Motion for an order on plaintiff to show cause why costs of former suit should *should* not be paid or this cause dismissed.—Clerk's office district court, Lancaster county, Ne-
31 braska—Filed Jun- 10–1903—W. C. Phillips, clerk district court.

Order to Show Cause.

In District Court, Lancaster County, Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
NORTHERN ASSURANCE COMPANY OF LONDON, England, Defendant.
} Order to Show Cause.

On reading the motion of the defendant filed herein and the affidavit of R. W. Breckenridge in support thereof, asking an order that plaintiff show cause why plaintiff should not pay certain costs of the former litigation of this suit stand dismissed.

It is ordered that the plaintiff pay the balance of costs due in a certain cause recently pending in the circuit court of the United States for the district of Nebraska, entitled Grandview Building Association—*v.*—Northern Assurance Company of London, England, docket 7, No. 85, in the sum of $400.88 by June *27th*, 1903., or show cause, if any it can, why said costs are not paid, otherwise this cause shall stand dismissed. It is directed that a copy of this order be served upon Halleck F. Rose, attorney for the plaintiff.

Dated, Lincoln, Neb. June 10, 1903.

By the court

EDWARD P. HOLMES, *Judge.*

Endorsed:—30–206 District court Lancaster county Nebraska—Grandview Bldg. Ass'n—*v.*—Northern Assurance Co.,—Order to show cause—Clerk's office district court, Lancaster county Nebraska—Filed Jun- 10–1903—W. C. Phillips, clerk district court.

32 *Return to Order to Show Cause.*

In the District Court of Lancaster County, Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
NORTHERN ASSURANCE COMPANY OF LONDON ENGLAND, Defendant.

1. Comes now the plaintiff and for its return to the order to show cause why the case should not be dismissed — heretofore on the 10th day of June entered herein, suggests to the court that the suit referred to in said order was an action at law, in which no equitable relief was demanded by reformation or otherwise, and that the same was prosecuted to final judgment and the rights of the parties in respect to costs were settled and adjudicated therein by a final judg-

ment enforceable by execution, which in equity may be made the ground of set-off to any judgment rendered herein, in event it should appear that this defendant is insolvent.

2. That the said Northern Assurance Company appeared and defended said cause, without interposing any motion for security for costs in the case mentioned in said order, and thereby expressly waived the giving of security for costs in said case by the plaintiff.

3. The plaintiff further shows to the court that in and by its petition filed herein it has voluntarily remitted from its claim and demand justly due from defendant, a sum in excess of the item of costs mentioned in said order, and in support of this statement, plaintiff refers to its petition on file in this action, as well to the allegations thereof as to the prayer for relief.

4. Plaintiff further suggests to the court that neither the
33 statutes nor the rules of practice and procedure in this honorable court impose any burden on the plaintiff, either in a suit of law or in equity, to make provision or give security for costs, other than the costs of the immediate suit under consideration by the court. This plaintiff is entitled to prosecute the cause stated in his petition to final judgment upon compliance with the statutes made in that behalf, and the court is without power to impose as a condition upon plaintiff's right to hearing the payment of a judgment in an independent suit.

5. The grounds of said motion and the matters and facts set forth in the affidavit in support thereof do not appear upon the face of the petition, and do not relate to the jurisdiction of the court to entertain the cause, and under sections 94, 96 and 99 of the Code of Civil Procedure, it is required that such objections be made by answer, and, that if not made by answer, the same are waived.

Wherefore, the plaintiff moves the court to discharge the rule heretofore entered in that behalf, and to rule the defendant to answer, and prays the judgment of the court whether it shall be further required to defend against the said motion.

HALLECK F. ROSE,
WILMER B. COMSTOCK,
Attorneys for Plaintiff.

Endorsed: 30-206.—District court Lancaster county Nebraska.—Grand View Bldg. Association, plaintiff *vs.* Northern Assurance Company of London, England, defendant—Return to order to show cause.—Clerk's office district court, Lancaster county Nebraska.—Filed Jun. 27–1903.—W. C. Phillips, clerk district court.

Journal Entry.

That on the 27th day of June A. D. 1903 (that being the
34 41st judicial day of the May A. D. 1903 term of said court) were had and done the following proceedings as appear upon Court Journal "43" page 478.

GRAND VIEW BUILDING ASSOCIATION
vs.
THE NORTHERN ASSURANCE CO. } 30-206.

This cause now comes on to be heard upon the motion of the defendant for an order on the plaintiff to pay costs of a former suit or that this cause be dismissed, and is submitted to the court, on due consideration whereof it appearing to the court that a new cause of action is the basis of this suit, and that the defendant has a judgment for costs in a former action against the plaintiff herein and that the judgment is collectible, it does not appeal to the discretionary powers of the court to impose a penalty asked for as a condition precedent to the right of plaintiff to further prosecute this action, and it is therefore by the court ordered that said motion be, and the same hereby is denied, and that the rule to show cause heretofore entered herein be, and the same hereby is vacated and set aside, to which the defendant duly excepts; it is further ordered that the defendant file answer herein within twenty days from this date.

Answer.

District Court, Lancaster County, Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
NORTHERN ASSURANCE COMPANY OF LONDON, Defendant.

Comes now defendant and answering the petition of the plaintiff herein shows to the court the following facts:

35 I.

The defendant admits the allegations of paragraph one of plaintiff's petition and denies each and every other allegation in said petition contained not hereinafter specifically admitted.

II.

Defendants admits that on the 31st day of December, 1896 the plaintiff owned the property mentioned in paragraph two of plaintiff's petition and that it was of the value therein alleged and that it was on that day all-ready insured in the sum of fifteen hundred dollars under a policy theretofore procured by plaintiff and issued by the Fireman's Fund Insurance Company. Defendant also admits that on said date the plaintiff applied to defendant for a policy of insurance in defendant company and defendant issued to plaintiff its certain policy in the sum of $2500 covering the property described in said paragraph two of plaintiff's petition for the term of two years from said 31st day of December, 1896, at noon.

Defendant avers that its said policy contains the following provision.

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

And its said policy also contained the following stipulation and condition:

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power
36 or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

III.

Defendant avers that it had no knowledge at the time it issued its said policy that there was any other insurance upon the property covered thereby and avers that no consent to such other insurance was endorsed upon its policy or added or attached thereto. Defendant avers that its said policy never in fact took effect because of such other insurance not known to it and not consented to by written endorsement thereupon.

IV.

Defendant avers that it did not know that there was other insurance upon said property covered by the said policy until after said property had been destroyed by fire and that upon receipt of such information, it immediately and on August 4, 1898, tendered to plaintiff the premium upon said policy in the sum of $33.75 which the plaintiff then refused to take.

V.

The defendant denies that its agent at the time of the making and delivery of its said policy knew that there was then in existence another policy of insurance in the Fireman's Fund Insurance Company for the sum of fifteen hundred dollars upon the property covered by the defendant's policy and this defendant denies specifically that there was any mistake between the plaintiff and defendant as to the

terms of defendant's policy; and defendant avers that the policy delivered by defendant's agent, in fact recited the terms of the contract made by and between the plaintiff and defendant; and defendant denies that there was any fraud practiced either by it or its agent whereby there was omitted from said policy consent by defendant to the other insurance already subsisting upon said property.

37

VI.

Defendant specifically denies liability upon its said policy and avers that said contract never in fact took effect and was void by its terms from its inception because of the fact that there was then other insurance on the property covered thereby not consented to in writing endorsed thereon or attached thereto, as required by the terms of said policy. Defendant renews its tender of the premium paid upon said policy and brings into court the said sum of $33.75 for the use of the plaintiff, not waiving its plea in abatement stated in paragraph XI hereof.

VII.

The policy issued by defendant to plaintiff contained the following provision:

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

The defendant shows that the plaintiff claims in its petition herein that the property covered by said policy of insurance was burned and wholly destroyed by fire on June 1st, 1898. The petition in this cause was filed Jan. 21, 1903, and this action is barred by the terms of said policy.

VIII.

Defendant further shows by this action, which is brought to secure a reformation of the said policy of insurance because of the mutual mistake of the parties, or the fraud of defendant, so that same shall recite consent to the previous insurance on the property, was commenced Jan. 21, 1903, that the policy was delivered to plaintiff on the day of its date December 31, 1896, and that said plaintiff and its officers have had said policy in their possession continuously from

38 that time and the plaintiff and its officers could have discovered by an inspection of said policy upon the date of its delivery to plaintiff that said policy did not contain the agreement for, and consent to, other insurance which plaintiff now says should have been endorsed thereon, and the plaintiff's present cause of action then accrued and defendant says that this action is barred by sections 5 and 10 of the Code of Civil Procedure of Nebraska which reads as follows:

"SEC. 5. Civil actions can only be commenced within the time prescribed in this title after the cause of action shall have accrued."

"SEC. 10. Within five years, an action upon a specialty, or any agreement, contract, or promise in writing or foreign judgment."

IX.

Plaintiff further avers that on September 29, 1898, the plaintiff brought an action in this court and against this defendant to recover against the defendant the sum of twenty-five hundred dollars upon the identical policy involved in this suit. The petition therein contained the specific allegation that the fact of the other insurance upon the property covered by defendant's policy was communicated to defendant's recording agent at Lincoln, but the petition in said former suit, which is on file in this court, avers that defendant's agent "in fact accepted said risk and issued said policy, and collected and received said premium as such agent in behalf of defendant with knowledge beforehand of said concurrent insurance and with the intent knowingly to waive the condition of said policy that, 'it shall be void if the insured now has or shall hereafter make or procure any other contract of insurance' on the property covered thereby. And by the aforesaid several acts and by procuring, receiving, accepting and retaining of said insurance premium with knowledge of said subsisting concurrent insurance the defendant has waived the said condition and is estopped to claim benefit thereof and is bound by its said policy notwithstanding said condition."

39 In its answer in said suit this defendant denied liability upon the ground that no consent to the other insurance was endorsed upon its policy and relied upon the conditions of its policy which are set forth in paragraph II of this answer, and denied that either it or its agent knew of the fact of said other insurance until after the fire. Said action was removed by this defendant, upon the ground of the divers citizenship of the parties, to the circuit court of the United States for the district of Nebraska, in which court the plaintiff filed a reply to the answer of defendant in which it is again aver-ed that the existence of the policy of fifteen hundred dollars in the Fireman's Fund Insurance Company was known to defendant's agent and that said agent "with full knowledge of said fact, accepted the risk and wrote, executed and delivered said policy to defendant, with the intent on the part of both plaintiff and defendant that the same should be concurrent with the said subsisting insurance and not avoided or affected thereby, and with purpose and intent of defendant knowingly to waive and forego all benefit of the provisions of said policy set forth in the defendant's answer."

Said cause proceeded to trial in said circuit court of the United States for the district of Nebraska, was taken from there to the United States circuit court of appeals for the eighth circuit and from the latter court removed to the Supreme Court of the United States by writ of certiorari, which latter court held that the defendant was

not liable upon this policy; that it had the right to protect itself against over-insurance by the provisions herein referred to in said paragraph II of this answer, and that said contract could not be changed or altered by parol testimony and that admitting the knowledge of defendant's agent when he delivered the policy in suit of the pre-existing insurance, the defendant had not thereby
40 waived the said provisions of its contract; and the Supreme Court of the United States reversed the decision of the United States circuit court of appeals for the eighth circuit and the United States circuit court for the district of Nebraska and directed the said circuit court, where said cause was tried to enter a judgment in favor of defendant at plaintiff's cost, which was done; the right of the plaintiff to recover from defendant upon the policy involved in this action because no consent to other insurance was endorsed upon said policy, was adjudicated against the plaintiff, and the defendant pleads said adjudication in bar of this action.

The decision of the Supreme Court of the United States is reported under the title "Northern Assurance Company of London, *v.* Grand View Building Association," 183 U. S. 308 and is also found under the same title in volume 22 of the Supreme Court report at page 133.

X.

The defendant avers that long prior to the time when the plaintiff instituted the suit upon the policy as written and delivered, the suit being the one described in the preceding paragraph of this answer, and long before the fire which destroyed the plaintiff's property, the plaintiff having possession of the policy became and was fully advised of the terms and conditions thereof and particularly that the defendant did not therein consent to other insurance upon the property therein described by writing endorsed thereon or attached thereto.

And this defendant says that after the plaintiff had become fully informed of all the terms and conditions expressed in the policy, and particularly of the terms and conditions with respect to other insurance, it neglected and refused to make any demand whatsoever upon the defendant to have the policy changed to conform to
41 the alleged understanding set out in this petition herein and refuse- to bring any suit to have the same reformed in accordance with said alleged misunderstanding; but on the contrary the said plaintiff with full knowledge of such terms and conditions, and particularly with respect to other insurance, elected to stand upon the policy as written and delivered and to waive the right to have the policy changed in accordance with its alleged understanding of the agreement and thereupon instituted the suit referred to upon the policy as written and delivered and prosecuted the same to a final determination in the Supreme Court of the United States thereby causing the defendant great trouble, annoyance cost and expense amounting to more than two thousand dollars, and this defendant

alleges that the plaintiff, by its said election and conduct thereby ratified the terms and conditions of the policy as written and delivered and that the said plaintiff is estopped from asserting any claim or right whatever by virtue of the pretented agreement or understanding described in the petition herein.

XI.

The defendant further avers that in the litigation set forth in paragraph IX of this answer, which this defendant avers involved the subject matter of the present suit, the defendant incurred large costs and expenses and recovered a large judgment against the plaintiff for costs in the sum of $400.88 which the plaintiff refuses to pay, although, as defendant is informed and believes and charges the fact to be, plaintiff could pay if it would. The defendant, not intending hereby to waive any of its defences to the present suit hereinbefore set out or its plea in bar by the former adjudication between the parties, pleads the non-payment of the costs of said other litigation between the parties hereto concerning the subject matter
42 of the present suit, in abatement of the present action.

Defendant further shows that this action, which is brought to secure the reformation of the said policy of insurance because of the mutual mistake of the parties or the fraud of defendant so that same shall recite consent to the previous insurance on the property, was commenced January 21, 1903, plaintiff's said cause of action, if any it has, accrued on the day of the date of the policy, to-wit; December 31, 1896, at which time plaintiff and its officers had an opportunity and could have discovered by an inspection of said policy that it did not contain the agreement for a consent to other insurance which plaintiff now says should have been endorsed thereon; but defendant avers that the plaintiff's cause of action, in any it has, accrued at the very latest and at all events on or about August 4, 1898, at which time plaintiff was informed that said policy did not contain the agreement now sought to be added thereto, by the receipt of a letter from the defendant dated August 2, 1898, in which defendant denied liability to plaintiff on said policy because no agreement for concurrent insurance was contained therein and this action is barred under section 12 of the Code of Civil Procedure of Nebraska which is as follows:

"Within four years, and action for trespass upon real property; an action for taking, detaining, or injuring personal property, including actions for the specific recovery of personal property; an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated; an action for relief on the ground of fraud, but the cause of action in such case shall not (be) deemed to have accrued until the discovery of the fraud."

Wherefore defendant, having fully answered, prays that this suit be abated and proceed no further until the plaintiff shall pay the costs of the former litigation between the parties in the sum of

$400.88 and that upon the trial of this cause defendant be hence dismissed, without day with its costs.

43 THE NORTHERN ASSURANCE COMPANY OF LONDON,
By GREENE, BRECKENRIDGE & KINSLER.

STATE OF NEBRASKA, } ss:
County of Douglas, }

R. W. Breckenridge, being duly sworn, says that he is one of the attorneys for the defendant in the foregoing answer named; that said defendant is a corporation, hence affiant makes this verification that the facts in said answer stated are true as affiant believes.

R. W. BRECKENRIDGE.

Subscribed in my presence and sworn to before me 1st day of July, 1903.

ANNA STAPLES,
[SEAL.] *Notary Public.*

Endorsed: #30-206 District court, Lancaster county Nebraska—Grand View Building Association pl'ff *v.* Northern Assurance Company of London, def't—Answer—Clerk's office district court, Lancaster county Nebraska—Filed Jul-6-1903—W. C. Phillips, clerk district court.

Reply.

In the District Court of Lancaster County, Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
THE NORTHERN ASSURANCE COMPANY OF LONDON, Defendant. } Reply.

Comes now the plaintiff and for its reply to the answer of the defendant filed herein, says:

1. Plaintiff admits that the policy mentioned in the petition contained, among other things, the provisions quoted in paragraph II of the said answer, and plaintiff alleges that because of said
44 provisions, notwithstanding the omission of said policy to state in writing the permission for concurrent insurance which was, in fact, contracted for as in the petition alleged, plaintiff is without remedy at law.

2. For reply to paragraph III of said answer, plaintiff admits that no consent to other insurance was endorsed upon the policy referred to in said answer and in the petition, but alleges that the failure to so endorse such consent, in conformity to the agreement as alleged

in the petition, was due to mistake or fraud upon the part of the defendant and defendant's agent, as is fully alleged in the petition. And for further reply to said paragraph III of the answer, the plaintiff denies each and every allegation therein contained.

3. For reply to paragraph IV of said answer, the plaintiff denies each and every allegation therein contained.

4. For reply to paragraph V of said answer, the plaintiff denies each and every allegation in said paragraph of the answer contained.

5. For reply to paragraph VI of said answer, the plaintiff denies each and every allegation in said paragraph of the answer contained.

6. For reply to paragraph VII of said answer, the plaintiff says: First: That the facts stated in said paragraph of the answer and pleaded therein as a separate defence are not sufficient to constitute a defence to plaintiff's petition, and that the provision therein set forth is repugnant to the laws and the policy of this State, and in contravention of the statute of limitation providing that a suit upon a contract in writing may be brought within five years from the date when the cause of action thereon accrues.

45 Second: Plaintiff for further reply to said paragraph and said separate defense says that by reason of the mistake and fault and neglect of the defendant in failing to provide in and by said policy consent for the writing of concurrent insurance, the policy was erroneously and fraudulently so drawn as to prevent the maintenence of an action at law thereon, and that plaintiff, being without remedy at law, is obliged to resort to this suit in equity to compel the execution of the contract actually made by reforming said instrument.

7. For reply to paragraph VIII and to paragraph 8½ added by amendment and to the separate defenses therein pleaded by said answer, this defendant says: First. That the facts set forth in said paragraph are not sufficient to constitute a defense to plaintiff's petition. Second: Plaintiff for a further reply to said defense alleges that the fire occasioning the loss by plaintiff mentioned in its petition, did not occur until on or about the first day of June, 1898, and that five years thereafter had not elapsed when this action was brought; that by the statute of limitations, section 10, mentioned in said answer, plaintiff's right to sue and maintain his action upon said policy would have subsisted at law for the period of five years from said June 1, 1898, and that the right to equitable relief by reformation, made necessary because of defendant's mistake, neglect or fraud, as alleged in the petition, subsisted so long as the legal remedy would have subsisted if said writing had been so drawn as to express the true contract between the parties.

8. For its reply to paragraph IX of said answer plaintiff says that the action therein mentioned and referred to was a suit at law, in which no equitable remedy was envoked, and that the court

46 of law wherein said cause was tried was without power in said action to grant any equitable relief. Plaintiff further says that in the said cause all questions of fact in issue were found in

favor of this plaintiff and against the defendent. It was found and determined in said cause that the fact of subsisting insurance at the time defendant's policy was written, was known to the recording agent of defendant, A. D. Borgelt, and had been reported to said Borgelt by plaintiff prior to the issuance of said policy, and that said Borgelt at the time issued said policy with knowledge of said concurrent insurance, and that he then had authority from defendant to countersign and issue its policy and accept fire insurance risks on its behalf, and collect and receive premiums therefor. It was further found as a matter of fact in said cause that the property so insured exceeded in amount the sum of $4,000, and relief was therein denied to plaintiff, notwithstanding the finding of all the facts in plaintiff's favor, solely upon the legal ground that the court of law was without power to grant relief except in accordance with the letter of said contract, and that a reformation of said policy was a condition precedent to plaintiff's right to enforce the same. Wherefore the plaintiff says that the court rendering the said judgment was without power to render the relief herein prayed for; that the relief herein sought is other and different relief from that sought in the action mentioned in said answer; and that the issues in the respects aforesaid are not identical and that the judgment referred to in said answer is not an adjudication of the cause of action set forth in plaintiff's behalf herein.

9. For reply to paragraph X of said answer, and to the separate defense set forth and pleaded therein, this plaintiff denies each and every allegation therein contained. For a further reply to
47 said paragraph and defense, this plaintiff says that the suit alleged in said paragraph to have been prosecuted by this plaintiff to a final judgment in the Supreme Court of the United States was a suit at law, and was not a suit in equity; that in and by its petition in said suit, which was the same suit referred to in paragraph IX of said answer, there were no allegations or averments that were in any particular inconsistent with the allegations and averments set forth in the petition herein. On the contrary thereof, plaintiff in the suit aforesaid affirmatively alleged the failure of defendant to write upon such policy permission for concurrent insurance, and affirmatively alleged that the said policy was conditioned that it should be void if there be other insurance without consent therefor endorsed thereon in writing. And plaintiff further alleged the knowledge of the agent of defendant of said other insurance, which had been duly reported to said agent. And upon said facts, the plaintiff made no election to claim upon the policy as written and to waive his right to a reformation, but mistook his remedy merely in this: plaintiff alleged that by reason of the facts aforesaid, the defendant had waived the said policy condition and was estopped to claim exemption from liability by reason thereof and that by reason of said estoppel, plaintiff could maintain his action upon said policy in a suit at law without first resorting to a court of equity to have the same reformed. Plaintiff alleges that its present action

is in no wise inconsistent with any fact alleged in said petition at law, but that it was held in said action at law, that the redress which plaintiff sued for, by obtaining a mere judgment at law on said contract was not compatable with the facts which appeared in the petition itself, showing that the contract, as erron-ously written by the
48 defendant's agent, was, according to its letter, void until so reformed as to express the true intent and meaning of the parties thereto. Wherefore, by reason of the premises, the plaintiff says that it has not made any election to abide by the terms of the contract as the same was written; and upon the facts of this case as they exist, and as alleged in the petition of plaintiff in the suit mentioned in said answer and in its petition herein, there was no choice or election of the remedies open to plaintiff, and plaintiff's sole remedy was in a court of equity, and for the relief herein prayed, and it is not estopped or concluded thereby to claim the relief sued for in this action, which is entirely compatable with all of the averments of the petition in the suit mentioned in said answer. Plaintiff says that any costs incurred by defendant in said suit were due to defendant's failure to recognize and pay to plaintiff the amount of its loss and claim which in equity and good conscience it was obligated to pay, and all thereof were made and incurred by the inequitable and unconscionable conduct of said defendant in its endeavor to defeat the just and equitable claim of plaintiff.

10. For reply to paragraph XI of said answer, and to the plea and abat-ment therein set forth, this plaintiff says that prior to the filing of said answer, the defendant presented the same identical issue by a specific motion and plea in abatement, and procured adjudication thereon, and that judgment has already been entered herein upon said plea in favor of this plaintiff and against the defendant. Plaintiff further says that for the collection of the costs mentioned in said paragraph, the defendant has an adequate remedy at law by proceedings on execution upon its said judgment, and that,
49 if payment of said judgment for costs prior to the enforcement of said policy should be imposed upon this plaintiff as an equitable condition of granting plaintiff relief then plaintiff desires and offers to abide the judgment of the court and to comply with such equitable terms as the court may impose.

Wherefore, plaintiff prays as in its petition prayed.

HALLECK F. ROSE AND
WILMER B. COMSTOCK,
Attorneys for Plaintiff.

The words "and to paragraph 8½ added by amendment" were interlined in paragraph 7 of this reply Sept. 26, 1903, by leave of court.

H. F. ROSE.
Att'y for Pl'ff.

STATE OF NEBRASKA, } ss:
Lancaster County, }

Halleck F. Rose, being first duly sworn says; the plaintiff *is* in this case is a corporation, and I am its duly authorized attorney, and I believe the facts set forth in the above and foregoing reply to be true.

HALLECK F. ROSE.

Subscribed in my presence and sworn to before me this 10th day of September, 1903.

H. C. PROBASCO,
[SEAL.] *Notary Public.*

Endorsed: 30–206 District court Lancaster county Nebraska. Grand View Bldg. Association, plaintiff, *vs.* Northern Assurance Company of London, defendant. Reply. Clerk's office dis-
50 trict court Lancaster county Nebraska. Filed Sep. 11, 1903. W. C. Phillips, clerk district court.

Journal Entry.

That on the 26th day of September A. D. 1903 term of said court (that being the 9th judical day of September A. D. 1903 term of said court) were had and done the following proceedings as appear upon court journal "43" page 520, to-wit;

GRAND VIEW BUILDING ASSOCIATION
vs.
THE NORTHERN ASSURANCE COMPANY OF LONDON. } 30–206.

Leave is hereby given the defendant to amend its answer herein by interlineation, instanter, and leave is also given the plaintiff to amend its reply by interlineation within three days from this date.

Journal Entry.

That on the second day of October A. D. 1903 (that being the 14th judicial day of the September A. D. 1903 term of said court) were had and done the following proceedings as appear upon court journal "43" page 537 to-wit:

GRAND VIEW BUILDING ASSOCIATION
vs.
THE NORTHERN ASSURANCE COMPANY OF LONDON. } 30–206.

Now on this day came the parties hereto by their attorneys,
51 and trial of this cause is had to the court and after hearing the testimony of witnesses adduced, it is by the court ordered

that said cause be passed for further hearing to be taken up by agreement of parties after October 18th, 1903.

Journal Entry.

That on the 22nd day of October A. D. 1903 (that being the 25th judicial day of the September A. D. 1903 term of said court) were had and done the following proceedings as appear upon court journal "43" page 566 to-wit:

GRAND VIEW BUILDING ASSOCIATION
vs.
THE NORTHERN ASSURANCE COMPANY. } 30–206.

Now on this day again came the parties hereto by their attorneys, and the trial of this cause proceeded, and after hearing the testimony of witnesses adduced in part and the hour of adjournment being at hand, further proceedings herein are continued until to-morrow morning at nine o'clock.

Journal Entry.

That on the 23rd day of October A. D. 1903 (that being the 26th judicial day of the September A. D. 1903 term of said court) were had and done the following proceedings as appear upon court journal "43". page 568 to-wit;

GRAND VIEW BUILDING ASSOCIATION
vs.
THE NORTHERN ASSURANCE COMPANY. } 30–206.

Now on this day again came the parties hereto by their at-
52 torneys, and the trial of this cause proceeded, and after hearing the remaining testimony of witnesses adduced and the argument of counsel, the same is submitted to the court for consideration.

Journal Entry.

That on the 9th day of November A. D. 1903 (that being the 39 judicial day of the September A. D. 1903 term of said court) were had and done the following proceedings as appear upon court journal "43" pages 597 to-wit;

GRAND VIEW BUILDING ASSOCIATION
vs.
THE NORTH ASSURANCE COMPANY OF LONDON. } 30–206.

This cause having been heretofore tried and submitted to the court upon the evidence adduced at the trial thereof, and the argument

of counsel being had in the premises and the court being now advised, finds the following facts and conclusions of law based thereon:

1. The plaintiff is a corporation organized under the laws of Nebraska. The defendant is a corporation, incorporated under the laws of Great Britain and Ireland, with power to do a general fire insurance business in the State of Nebraska.

2. That on the 31st day of December 1896 the plaintiff was the owner of certain personal property, consisting of household effects, situated in the three story brick and stone building on lot F. Grand View Park addition in Lancaster county, Nebraska, and used as a boy's military and boarding academy. That said personal property was of the value of $4000 and upwards; that at said last above mentioned — the said personal property so described was insured
53 against loss of damage by fire in the sum of $1500 issued by the Fireman's Fund Insurance Company a corporation organized under the laws of California and at which time said insurance was subsisting and in full force and effect up to and including the date of the destruction of said property by fire as hereinafter found.

3. That on the 31st day of December 1896, plaintiff applied to defendant for further and additional insurance in the sum of $2500 upon said property, that said defendant company had knowledge by and through its daily authorized agent of the insurance, to-wit: $1,500 thereon in the said Fireman's Fund Insurance Company, and that said defendant company accepted such application for said insurance of $2,500 with the understanding by and through its agent that said $2,500 insurance so written by the defendant was to be additional and concurrent with the subsisting $1,500 insurance aforesaid, and that thereupon the plaintiff paid to the defendant company through its agent the sum of $33.75 as a premium agreed upon for said insurance for the term of two years.

4. That thereupon, and in consideration of the payment of such premium the defendant company delivered to the plaintiff a policy of insurance upon said property, insuring the plaintiff for the term of two years from the 31st day of December, 1896, to the 31st day of December, 1898, against all loss or damage by fire of the personal property herein mentioned and described.

5. That said policy of insurance so issued by the defendant company to the plaintiff herein was delivered to the president of the said plaintiff company, who received the same and without examination placed the same in his safe without knowledge of the
54 contents of said policy as to its terms herein expressly found and described.

6. That on or about the first day of June, 1898, and during the term of said insurance, and while said policy was in full force and effect, the said personal property of the plaintiff described herein was burned and wholly destroyed by fire.

7. That said policy was executed on the said defendant company's behalf by its agent in the city of Lincoln, A. D. Borgelt who had au-

thority from the defendant to accept fire insurance risks for and on defendant's behalf and to countersign and issue policies for insurance, to collect, receive and receipt for premiums, and to provide by endorsement upon or added to said policies for the consent of the defendant company to the writing and carrying of insurance thereon to each policies so issued by him should be concurrent.

8. That the said agent failed to provide for the concurrent insurance of $1500 as herein described, upon said property, and by mistake failed to insert such provision in the policy by him issued, but that it was the intention of the plaintiff and the defendant that said policy should, by its terms, permit the concurrent insurance of $1500 of which the said defendant's agent had knowledge as is herein found. And that the plaintiff accepted the said policy and retained the same without discovering said omission and error until after the loss of said property by fire.

9. That on or about September 29th, 1898, the plaintiff commenced an action in this court and against the defendant company to recover the sum of $2500 upon the policy upon which this action is based and described in the plaintiff's petition and in said ac-
55 tion the plaintiff alleged that the fact of the other insurance upon the property covered by the defendant's policy was communicated to the defendant's recording agent at Lincoln, and aver-ed that the defendant's agent accepted said risk and issued said policy, and collected and received said premium as such agent in behalf of defendant, with knowledge beforehand of said concurrent insurance and with the intent to waive the condition of said policy that,

"It shall be void if the insured now has or shall hereafter make or procure any other contract of insurance on the property covered thereby, and by such acts, and by procuring, receiving, accepting and retaining such insurance premium with knowledge of said subsisting and concurrent insurance the defendant has waived said condition and is estopped to claim benefit thereof and is bound by said policy notwithstanding said condition."

10. That said defendant company in answer to the said petition denied liability upon the ground that no consent to the other insurance was endorsed upon its policy, and relied upon the condition of the policy above quoted, and denied that either it or its agent knew of said other insurance until after the fire. That said action so first brought by the plaintiff was removed by the defendant, upon the ground of divers citizenship, of the said parties, to
56 the circuit court of the United States for the district of Nebraska, in which court the plaintiff filed a reply alleging substantially as set forth in its petition.

11. That said cause so removed proceeded to trial in said circuit court of the United States for the district of Nebraska; was taken from there to the United States circuit court of appeals for the eighth circuit, and from the latter court removed to the Supreme Court of the United States by writ of certiorari, which latter court

held that the defendant was not liable upon said policy for the reason that it had the right to protect itself against over-insurance by the provisions herein quoted, and that the plaintiff was not entitled to recover in said action for the reason that the court of law, in which said action existed, was without power to grant relief except in accordance with the letter of said contract, that said action so pending in the circuit court of the United States, as herein described, was a suit at law and not in equity.

12. That for a long time prior to the commencement of the suit upon the policy as written and delivered, as found in the preceding finding, and long before the fire, which destroyed the plaintiff's property, the plaintiff had possession of the policy, as is herein found, and was fully advised of the terms and conditions thereof prior to the commencement of said suit, and that after such knowledge of the conditions was expressed in the policy, with respect to other insurance, the plaintiff made no demand whatsoever upon the defendant to have the policy changed to conform to such understanding as to concurrent insurance herein found, nor instituted any suit prior to the one at bar to have the said policy reformed in accordance with such understanding, but with knowledge of such
57 terms and conditions commenced the suit upon the policy as written and delivered, as herein found, and prosecuted the same to a final determination in the Supreme Court of the United States.

13. That in the prosecution of such suit the defendant incurred large costs and expenses and recovered a judgment against the plaintiff for costs in the sum of about $500.00 and expended large sums of money in defending said action to-wit; about $2,000.

14. That this action was commenced on the 21st day of January, 1903.

Upon the foregoing findings of fact the court bases the following conclusions of law.

1. The object of the present action, and the former action pending in the United States circuit court, as described herein and commenced by the plaintiff, was to recover upon the contract of insurance, and in the first suit, in said circuit court, the plaintiff did not predicate his right of recovery upon the exact terms of the written instrument, but sought to avoid the operation of the one condition described in the foregoing findings, of the written contract, by alleging that said insurance of defendant company was concurrent with the $1500. insurance then existing in the Fireman's Fund Company. These intrinsic facts, however, so alleged by the plaintiff and not embodied in the contract, present an issue not cognizable in the court of law, and for that reason, and that alone, the plaintiff was denied the right to recover. In the opinion of this court, the action first commenced and prosecuted to a conclusion in the Federal court was not a bar to the present action. The
58 true test being that the two actions must be so utterly inconsistent that the choice of one necessarily operated to renounce

the other. The remedy sought in the action at bar and the former proceedings are not repugnant to each other. They are not inconsistent. Plaintiff asked for something in the first instance that the court was powerless to grant, and under the pleadings, plaintiff cannot be construed to have elected to affirm the contract as originally written.

2. The ultimate end of the action at *abr* is to recover upon a contract in writing, the action is not barred, therefore, until after a period of five years.

3. That the plaintiff is entitled to the relief prayed for in its petition.

4. The contract described in plaintiff's petition is, therefore, reformed by the court, to conform to the facts, and plaintiff is entitled to judgment upon said contract against the defendant company in the sum of $2,000. together with interest from the 26th day of July, 1898, and for costs.

To each and every finding of fact and conclusion of law defendant company duly excepts.

It is therefore considered, adjudged and decredd by the court that the said policy of insurance issued by the defendant to the plaintiff and set forth in the petition herein, be, and the same hereby is reformed by adding thereto the following words:

"Consent is hereby given to additional insurance in the sum of $1500.00 to be concurrent herewith."

59 It is further considered and adjudged by the court that the said plaintiff Grandview Building Association, do have and recover of and from the defendant, The Northern Assurance Company, of London, the said sum of $2,000. with interest from the 26th day of July, 1898, amounting to this date to the sum of two thousand seven hundred and forty and 06-100 ($2740.06) dollars, as above found due it, with interest thereon at the rate of 7% per annum from this date until paid, together with the costs of this action, taxed at $—.

Given under my hand this 9th day of November, 1903.

EDWARD P. HOLMES,
Judge District Court.

60 *Motion for New Trial.*

District Court, Lancaster County, Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
THE NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, Defendant.

Comes now the defendant and moves the court to set aside its findings of fact and conclusions of law herein entered and to grant a new trial of said cause for the following reasons:

I.

That finding of fact numbered 3 is not sustained by sufficient evidence.

II.

That finding 6 is not sustained by sufficient evidence.

III.

That finding 8 is not sustained by sufficient evidence.

IV.

That finding 11 is not sustained by sufficient evidence.

V.

The court erred in admitting over the objections of defendant the testimony of H. J. Walsh given upon the trial of a former suit between these parties in the United States circuit court for the district of Nebraska.

61 VI.

For errors of law occurring at the trial and excepted to by the defendant.

GREENE, BRECKENRIDGE & KINSLER,
Attorneys for Defendant.

Endorsed: 30–206. District court Lancaster county, Nebraska—Grand View Bldg. Ass'n pl'ff *vs.* The Northern Assur. Co., def't—Motion for new trial—Clerk's office district court Lancaster county, Nebraska—Filed Nov. 11-1903—W. C. Phillips, clerk district court.

Journal Entry.

That on the 14th day of November A. D. 1903 (that being the 44th judicial day of the September A. D. 1903 term of said court) were had and done the following proceedings as appear upon Court Journal "43" page 609 to-wit:

GRAND VIEW BUILDING ASSOCIATION
vs.
NORTHERN ASSURANCE COMPANY. } 30–206.

It is by the court ordered that the defendant be, and is hereby granted forty days from the rising of the Court to reduce its exceptions herein to writing.

Journal Entry.

That on the 16th day of November A. D. 1903 (that being the 45th judicial day of the September A. D. 1903 term of said court) were had and done the following proceedings as appear upon
61½ Court Journal "43" page 612 to-wit:

GRAND VIEW BUILDING ASSOCIATION
vs.
THE NORTHERN ASSURANCE COMPANY OF LONDON, England. } 30–206.

This cause now comes on to be heard upon the motion of the defendant to set aside the findings of fact and conclusions of law heretofore entered herein and grant a new trial of said cause, and it is submitted to the court, on due consideration whereof the court doth overrule said motion, to which the said defendant duly excepts.

Bond.

District Court, Lancaster County, Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
NORTHERN ASSURANCE COMPANY OF LONDON, England, Defendant. } Undertaking on Appeal.

Whereas, in an action pending in the district court of Lancaster county, Nebraska, wherein the Grand View Building Association was plaintiff and the Northern Assurance Company of London was defendant, such proceedings were had that on November, 19, 1903, a judgment was rendered in favor of said Grand View Building Association against the Northern Assurance Company of Lon-
62 don for two thousand seven hundred and forty dollars and six cents ($2,740.06) and costs of suit, and said Northern Assurance Company of London intends to appeal said cause to the Supreme Court of Nebraska.

Now therefore, we, The Northern Assurance Company of London, as principal, and Frederick H. Davis, and Charles T. Kountz, as sureties, undertake to and with the Grand View Building Association in the sum of six thousand dollars ($6,000.) that the said Grand View Building Association will prosecute its appeal without delay and pay all condemnation money and costs which may be found against it on the final determination of the cause in the Supreme Court.

NORTHERN ASSURANCE COMPANY OF LONDON,
By GREENE, BRECKENRIDGE & KINSLER, *Its Attorneys.*
FREDERICK H. DAVIS.
CHARLES T. KOUNTZE.

STATE OF NEBRASKA, }
County of Douglas, } *ss:*

Frederick H. Davis and Charles H. Kountze being duly sworn, each for himself says that he is a resident of the State of Nebraska, and that he is worth the sum of six thousand dollars ($6,000.) beyond the amount of his debts, and has property liable to execution in Nebraska to the value of six thousand dollars ($6,000.) *(6,000).*

63 FREDERICK H. DAVIS.
CHARLES T. KOUNTZE.

Subscribed in my presence and sworn to before me this 20th day of November, 1903.

JOHN H. BEXTER,
[SEAL.] *Notary Public.*

The foregoing bond and the sufficiency of the sureties therein is approved by me at Lincoln, Nebraska, this 21st day of November, 1903.

W. C. PHILLIPS,
Clerk District Court, Lancaster County.
By W. L. CRANDALL,
Deputy.

Endorsed: 30-206 District court, Lancaster county, Nebraska—Grand View Building Association, pl'ff *vs.* Northern Assurance Company of London, def't—Undertaking on Appeal—Clerk's office district court, Lancaster county, Nebraska—Filed Nov. 21-1903—W. C. Phillips, clerk district court.

64 *Certificate.*

THE STATE OF NEBRASKA, }
Lancaster County, } *ss:*

I, W. C. Phillips, clerk of the district court, third judicial district of Nebraska, in and for Lancaster county, do hereby certify that the above and foregoing is a true and complete transcript of the petition and exhibit—motion of defendant to strike out part of plaintiff's petition—motion for an order on plaintiff to show cause why costs of former suit should not be paid or the cause dismissed—order to show cause—return to order to show cause—answer of defendant—reply of plaintiff—motion for new trial and undertaking on appeal—with all endorsements on each—ruling of the court upon motion to strike out parts of petition—ruling of the court upon motion of defendants for an order on the plaintiffs to pay costs of a former suit etc., order of court granting leave to defendant to amend an-

swer by interlineation instanter—also leave given plaintiff to amend its reply by interlineation within three days from date—ruling of court upon motion for new trial—order of court granting defendant forty days additional time to reduce exceptions to writing—together with all proceedings of trial and final judgment of our said court in a cause therein wherein Grandview Building Association is plaintiff and the Northern Assurand Association is defendant, as the same now appear fully upon the records and files of said court, and now in my charge remaining as clerk aforesaid.

I further certify, that the bill of exceptions herein attached is the original bill of exceptions filed in my office in the above
65 entitled action.

In testimony whereof, I have unto set my hand officially and attached the seal of said court at Lincoln, this 28th day of December, A. D. 1903.

W. C. PHILLIPS,
Clerk D. C.
By W. L. CRANDALL,
Deputy.

Trans fees $14.80.
[SEAL.]

Endorsed: 13617. Transcript. Supreme Court of Nebraska—Filed—Feb. 8 1904, Lee Herdman, Clerk.

66 And afterwards, on the same day, to-wit: the 8th day of February, A. D. 1904, there was filed in the office of the clerk of said supreme court a certain Bill of Exceptions, in the words and figures following, to-wit:

67 No. — App. Doc. 30 Pg. 206. Grand View Building Ass'n plaintiff *v.* Northern Assurance Co. defendant Clerk's office, district court Lancaster county, Nebraska. Filed Dec. 11 1903 W. C. Phillips, Clerk District Court.
E J A

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69 In the District Court of Lancaster County, State of Nebraska.

Defendant's Bill of Exceptions.

No. 30-206.

THE GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
THE NORTHERN ASSURANCE COMPANY, Defendant.

Appearances:

For Plaintiff: H. F. Rose and W. B. Comstock.
For Defendant: Greene, Breckenrigde & Kinsler.

Received the within Bill of Exceptions for examination and amendment this 8th day of *December*, 1903.

HALLECK F. ROSE,
Attorney for Plaintiff.

LINCOLN, NEBRASKA, *Dec.* 10, 1903.

I herewith return the within bill of exceptions and suggest no amendments.

HALLECK F. ROSE,
Attorney for Plaintiff.

70 Be it remembered, that at the September, A. D. 1903, term of the Lancaster County, Nebraska, District Court, of the Third Judicial District of Nebraska, to-wit: October 2nd, 1903, that being one of the days of said term on the hearing of the cause wherein Grandview Building Association was plaintiff, and the Northern Assurance Company, of London, England, was defendant, before the

Honorable Edward P. Holmes, Judge Presiding, the above named plaintiff and the above named defendant, each to maintain the issues of their respective parts, adduced testimony; and all of the said testimony, the objections thereto, with the grounds therefor; all the rulings of the Court on such objections, and all of the exceptions to such rulings having been made and taken at the time, and having been by the defendant reduced to writing in this its proposed bill of exceptions, and the same having been served on the attorney for the plaintiff, for examination and amendment; the said defendant now prays the Honorable Judge, before whom said cause was heard, that this bill of exceptions may be settled, allowed, signed, sealed, and made a part of the record in said cause in said Court.

71 (Paper identified as exhibit "1.")

ROSE: We offer to read in evidence the stipulation, exhibit "1," which is agreed to by both parties.

No objection.

(Exhibit "1" being as follows:)

71a This printed record is Exhibit A referred to in paragraph 6 of the stipulation of facts this day entered into between the parties in the case of Grand View Building Association *vs.* Northern Assurance Company, in the district court of Lancaster County, Nebraska, and forms a part of said stipulation.

Dated September 23, 1903.

HALLECK F. ROSE AND
WILMER B. COMSTOCK,
Att'y. for Grand View Bldg. Ass'n., Plaintiff.
GREENE, BRECKENRIDGE & KINSLER,
Att'y. for Northern Assurance Co., Defendant.

(Plaintiff's exhibit 1, Minor S. Bacon, Reporter.)

71b Transcript of Record.

Supreme Court of the United States, October Term, 1901.

No. 60.

NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, Petitioner,
vs.
GRAND VIEW BUILDING ASSOCIATION.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Petition filed May 10, 1900.

Certiorari and return filed May 29, 1900.

(17,753.)

71c (17,753.)

Supreme Court of the United States, October Term, 1900.

NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, Petitioner,
vs.
GRAND VIEW BUILDING ASSOCIATION. } No. 276.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

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72–1 Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the December term, 1899, of said court, begun and held at the United States court-house, in the city of St. Louis, Missouri, on the first Monday in December, to wit, the fourth day of December, A. D. 1899, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn, and Honorable Amos M. Thayer, circuit judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit, on the tenth day of April, A. D. 1899, a transcript of record, pursuant to a writ of error directed to the circuit court of the United States for the district of Nebraska, was filed in the office of the clerk of the Unied States circuit court of appeals for the eighth circuit, wherein The Northern Assurance Company of London, England, was plaintiff in error and The Grand View Building Associaion was defendant in error; which said transcript of record is in the words and figures following, to wit:

Pleas before the Honorable William H. Munger, judge of the district court of the United States for the district of Nebraska and sitting in the circuit court of the United States for the district of Nebraska, within the eighth judicial circuit, at the November, 1898, term thereof.

Be it remembered that on the 30th day of September, 1898, transcript from district court of Lancaster county, Nebraska, was filed in the clerk's office of said circuit court, which said transcript is in words and figures following, to wit:

23,265.

Transcript.

Pleas in the district court of the third judicial district of Nebraska in and for the county of Lancaster.

At the September, A. D. 1898, term of said court, begun and held in the said city of Lincoln, in said county and State, on the 5th day of Sept., in the year of our Lord one thousand eight hundred and ninety-eight, and on a day therein, to wit, on the 29 day of Sept., A. D. 1898 (that being a day in vacation after September, A. D. 1898, term of said court)—present, Hon. Albert J. Cornish, judge presiding—the following proceedings were had and done, to wit:

Be it remembered that at the several times hereinafter set forth were filed in the office of the clerk of said court papers of which the following are true and correct copies, and proceedings, among
72-2 others, were had and done in the cause below named before —— ——, judge presiding, as follows:

Petition.

In the District Court of Lancaster County, Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
THE NORTHERN ASSURANCE COMPANY OF LONDON, Defendant.

Petition.

Plaintiff complains of the defendant and for cause of action says:

1. Plaintiff is a corporation organized under the laws of Nebraska. The defendant is a corporation incorporated under the laws of the Kingdom of Great Britain and Ireland with power to insure property in the State of Nebraska against loss or destruction by fire.

2. On the 31st day of December, 1896, plaintiff was the owner of certain household and kitchen furniture and other articles of personal property hereafter described, situate in the three-story brick and stone building with slate roof on lot "F," in Grand View Residence Park addition in Lancaster county, Nebraska, occupied as a boys' military and boarding academy, which said personal property was of the value of $5,722.49.

On said December 31st, 1896, the defendant in consideration of the sum of $33.75 to it then paid by plaintiff as an insurance premium made and delivered to the plaintiff a policy of insurance on said property, a true copy whereof is hereto attached and made a part of this petition marked "Exhibit A," by the terms whereof defendant insured plaintiff for the term of two years from the 31st day of December, 1896, at noon to the 31st day of December, 1898, at noon against all direct loss or damage by fire to an amount not exceeding twenty-five hundred ($2,500) dollars to all of the aforesaid property while so located, which said property was in said policy referred to and described in the words following:

"Nothing on the three-story brick and stone building with slate roof and its additions including foundations and all fixtures and attachments of every description belonging to said building while occupied for dwelling purposes only, situated on lot F in Grand View Residence Park addition (referring to an addition to the city of Lincoln in Lancaster county, Nebraska), occupied as a boys' military and boarding academy.

$2,500.00 on household and kitchen furniture of every description, useful or ornamental, bedding, family wearing apparel, watches

and jewelry in use, plate and plated ware, musical instruments, sewing machine, printed books and music, pictures, paintings, engravings and mirrors and their frames (at not exceeding cost) amateur photographic outfit, billiard tables, trunks, garden tools and implements, screens, fuel and family stores, all while contained in the above-described building."

72–3 3. On the first day of June, 1898, during the term of said insurance and while said policy was in full force the aforesaid property of plaintiff covered by said insurance was burned and wholly destroyed by fire; and such fire was not caused by any act or neglect of plaintiff.

4. Plaintiff shortly prior to issuance of the aforesaid policy by defendant had procured a policy of insurance from the Firemen's Fund Insurance Company, incorporated under the laws of California, insuring it against loss by fire, of the same property in the sum of $1,500 for a term of two years, which insurance was then subsisting and remained in force to and including the date of said fire.

The fact of said subsisting insurance in said company was by H. J. Walsh, plaintiff's president, disclosed to defendant at and prior to the execution and delivery of its said policy and prior to payment by plaintiff of said premium therefor and was so by him orally disclosed and communicated to defendant's recording agent at Lincoln, Nebraska, A. D. Borgelt, who then had full authority from defendant to countersign and issue its policies and accept fire-insurance risks in its behalf and collect and receive therefor and who in fact accepted said risk and issued said policy, and collected and received said premium as such agent in behalf of defendant with knowledge beforehand of said concurrent insurance and with the intent knowingly to waive the condition of said policy that " it shall be void if the insured now has or shall hereafter make or procure any other contract of insurance " on the property covered thereby. And by the aforesaid several acts and by procuring, receiving, accepting and retaining of said insurance premium with knowledge of said subsisting concurrent insurance the defendant has waived the said condition and is estopped to claim benefit thereof and is bound by its said policy notwithstanding said condition. Plaintiff had no insurance on said property except as before stated.

5. On or about the 26th day of July, 1898, within sixty days from date of said fire, the plaintiff rendered and delivered to defendant a statement signed and sworn to by its president giving all the particulars of said fire, and of its loss and damage thereby sustained by the terms of said policy required which the defendant accepted and still retains; and plaintiff on its part has complied with all the conditions of said policy.

6. The plaintiff was owner of said property when so destroyed by fire and the same was then of the value of $5,722.49 and a schedule of the items thereof is hereto attached marked " Exhibit B " and made a part of this petition.

7. On the 26th day of July, 1898, the plaintiff demanded of de-

fendant the payment of said insurance; and defendant disregarding its undertaking in that behalf denies liability on the sole ground that said policy has been void from the date of its issue by reason of the said provision in regard to other insurance, the same provision which as aforesaid it had waived at time of issuing its said policy.

8. No part of said insurance has been paid and there is
72-4 now due and payable thereon from defendant to plaintiff the sum of two thousand five hundred ($2,500) dollars with interest thereon from the 26th day of July, 1898. Wherefore plaintiff prays judgment against defendant for the sum of two thousand five hundred ($2,500) dollars, with interest thereon from the 26th day of July, A. D. 1898, and costs of suit.

HALLECK F. ROSE,
Attorney for Plaintiff.

STATE OF NEBRASKA, *Lancaster County, ss:*

H. J. Walsh, being duly sworn, says on oath plaintiff is a corporation; I am its president and believe the facts stated in the foregoing petition are true.

H. J. WALSH.

Subscribed in my presence and sworn to before me this 30th day of August, 1898.

[SEAL.] J. K. HONEYWELL,
Notary Public.

EXHIBIT "A."

Here follows copy of policy, original of which appears in the bill of exceptions.

EXHIBIT "B."

Inventory of Furnishing Goods in Worthington Military Academy, Lincoln, Nebraska.

2 chairs, .76; 1 bed, 3.50; 1st springs, 1.25	5.51
1 mattress, 2.10; 1 mirror, 1.25	3.35
1 kitchen table, with drawers	1.50
1 pillow, .80; water can, .90; 1 basin, .55	2.25
1 steam table, 45.00; 1 boiler, 40.50	85.50
1 set-pan, 6.50; 1 laundry stove, 14.00	20.50
1 wire mat, 5.50; 1 saucepan rack, 13.50	19.00
4½ doz. chairs	42.97
3 hampers, 10.50; 4 chairs, 20.00	30.50
1 parlor set, 42.50; 1 chair, 8.00	50.50
1 chamber set, 22.00; 1 mattress, 18.00	40.00
1 lamp, 35c.; 1 potato-slicer, 4.25	4.60

	1 coffee-mill, 6.75; 1 ice-cream freezer, 6.85	13
	1 vig.-slicer, 4.90; 1 set scales, 3.10	8
	1 range, 96.00; 6 pails, .96	96
	2 flour cans, 1.80; 3 clothes-horses, 2.85	4
	3 sugar cans	1
	2 office chairs, 10.50; 2¾ doz. chairs, 46.75	57
	5 doz. chairs, 22.50; 56 mattresses, 263.20	285
	1 (*rice*) cooking utensils	109
	3 desks, 51.25; 1 settee, 15.00	66
72–5	1 bed-room set	22
	1 set springs, 1.25; 1 mattress, 5.60	6
	4 mirrors, 3.70; 1 set springs, 3.23	6
	56 iron beds	288
	7 tables	45
	4 hall seats	51
	1 coffee urn, 20.50; 1 tea do., 10.50	31
	1 set Rogers' knives & F., 2.90; 1 set T. spoons, 2.13	5
	1 set tablespoons, 3.00; 8 commodes, 40.00	43
	6 pillows, 13.00; 1 suit, 22.00; 2 wardrobes, 16.00	51
	4 tables, 7.75; 2 mattresses, 11.00; 2 sets springs, 2.50	21
	60 desks, 210.20; 27 seats, 152.80	363
	1 set charts & globe	160
	1 zinc box, 2.00; 1 armchair, 8.60; 2 drip-pans, .40	11
		$2,054
		$2,054
	4 kitchen tables, 6.46; 1 Rockford table, 33.75	40
	6 spoons, .45; grater, .05	
	1 potato-masher, .30; 1 sifter, .25	
	1 saucepan, 2.75; 3 dippers, .45	3
	3 covers, .25; 1 dresser & commode, 17.00	17
	1 chair, 1.10; 1 rocker, 1.50	2
	36 commodes	116
	1 kitchen table	3
	1 dish-pan, .65; 2 doz. Rogers' knives & forks, 11.60	12
	1½ doz. tablespoons, 6.38; 4 doz. tea do., 8.80	15
	½ doz. butter knives, 2.30; ½ doz. sugar spoons, 1.88	4
	1 wringer, 2.60; 1 wardrobe, 8.00	10
	10 commodes, 32.30; 1 wardrobe, 7.00	39
	1¼ doz. chairs, 6.05; 1 chop bowl & knife, .80	6
	4 scoops, .72; 1 oatmeal cooker, 2.00	2
	1 hod, .45; 1 do., .60	1
	2 lawn settees, 6.50; 1 refrigerator, 87.50	94
	1 bell, 1.50; 1 step-chair, 1.50	3
	1 step-ladder, 2.50; 1 pr. shears, .75	3
	1 brush, .75; 1 doz. knives & forks, 8.25	9
	1 dish-pan, 1.10; 3 tin pans, .15	1
	1 carpet-sweeper, 3.00; 1 scoop, 1.25	4

	1 iron roasting pan (to order)	4.90
	1 rocker, 4.00; table, 6.00; 1 rocker, 2.50; 3 settees, 10.00	22.50
	1 thermometer, .90; 1 cot mattress, 3.75	4.65
	2 doz. glasses, 1.00; 1 bed R. set, 27.00	28.00
	1 mattress, 7.00; 1 prc. pillows, 4.00	11.00
	1 table, 10.00; 1 rocker, 5.00; 1 sew. rocker, 3.50; springs, 4.50	23.00
	1 doz. milk-pans, 1.60; oil stove, .50	2.10
	1 tin basin, 10c.; 2 bookcases, 20.00	20.10
72–6	1 but. paddle, .15; 1 pail, .25; 1 set cover, 1.50; 2 mirrors, 2.00	3.90
	1 stool, .80; 2 pans, .60; 12 pans, 1.00	2.40
	1 set irons, 1.35; 3 brushes, 1.50	2.85
	1 teapot, 1.30; strainer, .10	1.40
	3 set- covers, 4.05; 1 griddle, .50	4.55
		$2,576.27
	1 flour-sifter, .25; 1 kitchen table, 1.75	2.00
	1 stool, .90; 1 pail, .25; cookers, 3.50	4.65
	1 bread pan, 1.15; 1 mirror, 1.10	2.25
	1 wardrobe, 9.00; 3 bells, .35	9.35
	2 rockers, 4.20; 1 tea kettle, .90	5.10
	1 bucket, 1.25; 1 scoop, 1.00	2.25
	3 joints of pipe, 1.70; 1 mirror, .75; caster, .10	2.55
	1 pillow, 1.50; 1 chop-bowl, .65	2.15
	1 drip-pan, to order	1.75
	1 egg-beater, can-opener & sifter	1.20
	1 bread-riser, .15; mustard spoons, .15	.30
	1 Sech water front	10.75
	1 mouse trap	.45
	2 candlesticks, .20; coffee-boiler, 2.00	2.20
	1 kit. table, 1.35; 1 can, .30	1.65
	1 kit. table, 1.75; 1 fork, .10	1.85
	960 ft. matting, 5.76; 210 ft., 1.26	7.02
	2 paring knives, .25; sieve, .20	.45
	1 can, .50; 1 chop-bowl, .35	.85
	2 butter paddles, .20; caster, .35; 1 kettle, .70	1.25
	1 doz. tablespoons, 1.00; 1 water-cooler, 5.00	6.00
	2 towel racks, .20; 23 yds. carpet, 19.55	19.75
	6 milk pans, .90; mirrors, .65	1.55
	1 waffle iron, .90; pail, .35	1.25
	1 pr. scissors, .50; 1 pail, .40	.90
	Knives & forks, .30; 1 cooker, 1.25	1.55
	12 milk pans, 1.65; 1 masher, .45; egg-whipper, .05	2.15
	1 set covers, 3.00; 1 kitchen table, 1.50	4.50
	1 sew, 9 table & kitchen table	3.00
	1 waffle iron, .90; 1 officers' table, 2.25	3.15
	1 pail, .35; 1 wash-dish, .30	.65

2 milk-covers, .70; 1 pail, .80	1.
1 kettle, .65; 3 kitchen chairs, .50	1.
3 knives and forks, .35; dipper, .60	
	2,684.
Spoons	
1 cake-turner, .30; kettle, 1.00	1.
3 trays	1.
2 dish-pans	1.
Apple-parer	
1 piece carpet	1.
Scissors & lamp	1.
72–7 1 skillet, .60; can, .40	1.
Knives, .30; kettle & grater	
1 porcelain kettle	1.
1 pot fryer	
1 egg basket	
1 galv. pan, .50; hose, 7.00	7.
2 knives, .25; 6 pans, .90	1.
12 dust-pans	
2 slop-pails, .80; 2 do., .50	1.
6 chairs, 5.50; 2 do., 3.50	9.
1 table, 6.25; 1 do., 16.50	22.
2 rockers, 4.00; 1 do., 2.50	6.
4 doz. plates, 4.20; 4 dishes, .82	5.
2 doz. cups and saucers	2.
6 pitchers, .90; (6), 1.20; (6), 1.00	3.
5 doz. butters, 1.75; glasses, 1.40	3.
6¼ yds. carpet, 5.50; scoop, 1.00	6.
2 doz. bowls, 2.00; 3 rugs, 6.50	8.
3 kettles, 1.00; strainers, .36	1.
6 pans, 1.26; saucepan, .25	1.
Galv. cups, .50; coal-hod, .35	
1 pail, .50; dish-pan, .45	
1 cooker, .35; shades, 3.50	3.
14 shades, 1.40; shears, .90	2.
1 kettle	1.
1 hod, .35	
1 gasoline stove	30.
1 galv. slop-can	7.
	2,823.
2 oils (set up)	10.
Chapel furniture	100.
Pictures	120.
Piano, "Weber"	200.
Organ, M. & H.	50.
Funk & Ogden bill	
Crockery & glasses	340.

	Hardy furniture	7.50
	3 dormitory furniture	24.00
	Gas & elect. fixtures	200.00
	Books in library	300.00
	Chemicals and furniture in laboratory	200.00
	Gymnas. fixtures, Id. lockers	100.00
	Quartermaster supplies	100.00
	Provision in store-room	155.84
	Coal	10.00
	14 pair blankets, (11), 36.00; (1), 8.00; (2), 8.00	52.00
	21 comforters	32.25
	8 bed-spreads	20.00
	3 pr. hemstitch pillow-cases	3.00
	24 pr. do.	9.60
72–8	2 stand lamps	5.00
	2 toilet-sets	8.50
	90 6/4 bed sheets, .25	22.50
	36 10/4 bed sheets, .40	14.40
	48 Turk. towels	14.40
	8 pr. pillows, (4), 14.00; (4), 10.00	24.00
	35 pr. pillows for 1/2 beds, 1.25	43.75
	6 doz. towels	18.00
	4 doz. towels	6.00
	10 lin. table-cloths	30.00
	8 doz. napkins	14.00
	Am't forward	5,065.12
	2 doz. damask towels	6.00
	2 doz. wiping towels	2.00
	2 tapestry table-covers	4.50
	3 pr. lace curtains	9.00
	1 pr. tap. do.	9.00
	1 7-ft. pole & fixtures	1.50
	Goods purchased by Rev. J. Hewitt:	
	Lincoln Carpet Co.	121.72
	Lincoln Carpet Co.	154.68
	Lincoln Carpet Co.	56.35
		56.35
		26.10
		18.35
		88.93
		3.60
		23.72
		36.50
		48.45
		5.00
		13.21
		1.26
		4.50

3 clocks (1), 12.00; (1), 5.00; (1), 1.50	18.50
1 letter-press	4.50
	$5,722.49

Indorsed: District court, Lancaster Co., Neb. Grand View Building Ass'n *v.* Northern Assurance Co. Petition. Clerk's office, district court. Filed Aug. 30, 1898. Sam E. Low, clerk district court.

72–9 *Summons.*

STATE OF NEBRASKA, *Lancaster County, ss:*

The State of Nebraska to the sheriff of said county, Greeting:

You are hereby commanded to notify The Northern Assurance Company of London, defendants, that *they* have been sued by Grand View Building Association, plaintiff, in the district court of the third judicial district in and for said county of Lancaster, and that unless it answer by the 3rd day of October, A. D. 1898, the petition of The Grand View Building Ass'n, plaintiff, filed against it in the clerk's office of said court, such petition will be taken as true and judgment rendered accordingly. You will make due return of this summons on or before the 12th day of September, A. D. 1898.

Witness my hand and seal of said court, at Lincoln, this 30th day of August, A. D. 1898.

[SEAL.]

SAM. E. LOW, *Clerk,*
By J. H. MALLALIEU, *Deputy.*

THE STATE OF NEBRASKA, *Lancaster County, ss:*

I hereby certify that on the 30th day of August, 1898, I served the within writ of summons on the within-named The Northern Assurance Company of London by delivering in person to A. D. Borgelt, attorney, for service a true and certified copy of the same, with all indorsements thereon; all done in Lancaster county, Nebraska, as required by law.

JOHN J. TROMPEN, *Sheriff,*
By F. M. WOODWARD, *Deputy.*

Fees.

Service and return	$ .50
Copy	.25
Mileage	.10
Total	.85

Indorsed: Summons. District court, Lancaster county. Doc. 23, page 265. Grand View Building Ass'n, plaintiff, *vs.* Northern Assurance Co., defendant. If defendant fail to appear and answer the plaintiff will take judgment for $2,500, together with interest thereon from July 26, 1898, and costs of suit. Attest: Sam. E. Low, clerk, by J. H. Mallalieu, deputy. Returnable Sep. 12, 1898. H. F. Rose. Received Aug. 30, 1898. John J. Trompen, sheriff. Clerk's office, disrict court. Filed Sep. 1, 1898. Sam. E. Low, clerk district court.

72–10 *Petition for Removal.*

In District Court, Lancaster County, Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
THE NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, Defendant.

Petition for removal to the circuit court of the United States for the district of Nebraska.

Your petitioner The Northern Assurance Company of London, England, respectfully shows to this honorable court that it is the defendant in the above-entitled action which is of a civil nature and that the matter and amount in dispute in this cause exceeds the sum or value of $2,000 exclusive of interest and costs. That the controversy herein is between citizens of different nations. That the plaintiff the Grand View Building Association was at the time of the commencement of this suit and still is a corporation created under the laws of Nebraska, transacting its business within the State of Nebraska. That the defendant is a corporation created under the laws of the Kingdom of Great Britain and Ireland, with its general western department managed from the city of Chicago, Illinois, and is a non-resident of the State of Nebraska. And your petitioner desires to remove this suit before the trial thereof into the circuit court of the United States to be held in the district of Nebraska. And your petitioner offers herewith good and sufficient surety for its entering in said court on the first day of its next session a copy of the record in this cause and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto.

And your petitioner therefore prays that the said surety and bond may be accepted and that an order may be entered removng this cause to the circuit court of the United States for the district of Nebraska, and that no further proceedings may be had herein. And we will ever pray.

THE NORTHERN ASSURANCE COMPANY
OF LONDON, ENGLAND,
By GREENE & BRECKENRIDGE, *Its Attorneys.*

STATE OF NEBRASKA, *Douglas County, ss:*

R. W. Breckenridge being duly sworn says he is one of the attorneys for the petitioner named in the foregoing petition for removal; that said petitioner is a corporation and affiant is authorized to verify said petition; and that the facts therein stated are true as affiant believes.

Further affiant saith not.

R. W. BRECKENRIDGE.

72–11 Subscribed in my presence and sworn to before me this 19th day of September, 1898.

[SEAL.] CHAS. V. MILES,
Notary Public.

Indorsed: Docket 23, No. 265. District court, Lancaster county, Nebraska. Grand View Biulding Ass'n, pl'ff, *vs.* The Northern Assurance Co., def't. Petition for removal to the circuit court of the United States for the district of Neb. Clerk's office, district court. Filed Sep. 20, 1898. Sam. E. Low, clerk district court.

In District Court, Lancaster County, Nebraska.

23, 265.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
THE NORTHERN ASSURANCE COMPANY OF LONDON, England, Defendant.

Answer.

Comes now the defendant, The Northern Assurance Company of London, England, and answering the petition of the plaintiff herein, says:

It admits the allegations contained in the first paragraph of the plaintiff's petition.

Defendant admits that on the 31st day December, 1896, plaintiff was the owner of a certain property mentioned and described in the second paragraph of said petition which on the said day was insured by the defendant as stated in said petition.

Defendant admits that on June 1, 1898, the property described in the policy of insurance written by the defendant was burned, but denies that at said time the said policy was in full force, and alleges that said policy was not then in force.

Defendant denies specifically the allegations of the fourth paragraph of said petition.

Defendant admits that within 60 days from the date of said fire

the plaintiff forwarded to this defendant what is denominated proofs of loss, the receipt of which so-called proofs of loss the defendant acknowledged, stating that it held same subject to the order of the plaintiff.

Defendant admits that at the date of said fire the plaintiff was the owner of the property which was burned, but denies that it was of the value stated in the 6th paragraph of the petition.

Defendant denies the allegations of the seventh paragraph of the petition, but admits that it denies liability.

Defendant denies the allegations of the 8th paragraph and further denies that there is anything due from the defendant to the plaintiff.

Further answering, this defendant alleges that the policy of insurance which it issued to the plaintiff on December 31, 1896, contained the following provision:

"This entire policy, unless otherwise provided by agree-
72-12 ment indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance whether valid or not, on property covered in whole or in part by this policy."

The defendant further says that its policy in question was issued to the plaintiff with the express statement therein made that it was issued "in consideration of the stipulations" therein named and of a certain amount of premium paid therefor. And said policy, besides the provisions above quoted, contains the following stipulation and condition:

"This policy is made and accepted subject to the foregoing stipulations and conditions together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

This defendant says that notwithstanding the stipulations, provisions and agreements above set forth and without the consent of the defendant endorsed upon said policy in writing and without the knowledge of the defendant, the plaintiff obtained a policy of insurance upon the property covered by the policy issued by this defendant in the sum of $1,500 in the Firemen's Fund Insurance Company.

Defendant says that the property upon which it issued its policy in the sum of $2,500 was represented by the plaintiff to the defendant to be of the value of $3,500.

The defendant alleges that by reason of the additional insurance

upon said property not consented to in writing endorsed upon the policy of defendant and not in fact known to the defendant, the policy written by the defendant upon the plaintiff's property was at the date of the fire which damaged or destroyed the plaintiff's property wholly void, and was and has been void from the date of such additional insurance.

Defendant further says that on the 5th day of August, 1898, the defendant tendered to the plaintiff in current funds the sum of $33.75, the amount of the premium paid by the plaintiff upon the policy in question, and now brings into court and tenders to the plaintiff the said sum of $33.75 with interest at the rate of 7% from Dec. 31st, 1896.

Wherefore, this defendant prays that judgment may be rendered against it for said sum of $33.75 with interest from Dec. 31st, 1896, with the costs of suit up to the filing of this answer, and no more.

GREENE & BRECKENRIDGE,
Attorneys for Defendant.

72–13 STATE OF NEBRASKA, *Douglas County, ss:*

R. W. Breckenridge, being duly sworn, says he is one of the attorneys for the defendant in the foregoing action named; that said defendant is a corporation, hence affiant makes this verification that the facts stated in the foregoing answer are true as he believes.

R. W. BRECKENRIDGE.

Subscribed in my presence and sworn to before me this 19th day of September, 1898.

[SEAL.] CHARLES V. MILES,
Notary Public.

Indorsed: Docket 23, No. 265. District court, Lancaster county, Nebraska. Grand View Building Ass'n, pl'ff, *vs.* The Northern Assurance Co., def't. Answer. Clerk's office, district court. Filed Sep. 20, 1898. Sam. E. Low, clerk district court.

Bond for Removal.

In District Court, Lancaster County, Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
THE NORTHERN ASSURANCE COMPANY OF LONDON, England, Defendant.

Bond for Removal.

Know all men by these presents that I am holden and stand firmly bound unto Grand View Building Association in the penal sum of five hundred dollars for the payment whereof well and truly to be made unto the said Grand View Building Association its successors and assigns, I bind myself, my heirs, representatives and assigns jointly and firmly by these presents;

Upon condition, nevertheless, that whereas The Northern Assurance Company, of London, England, has filed its petition in the district court of Lancaster county, Nebraska, for the removal of a certain cause therein pending wherein said Grand View Building Association is plaintiff and The Northern Assurance Company of London, England, is defendant, to the circuit court of the United States for the district of Nebraska.

Now if the said The Northern Assurance Company of London, England, shall enter in the said circuit court of the United States on the first day of its next session a copy of the record in such suit and shall pay all costs that may be awarded by the said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and effect.

In witness whereof, I have hereunto set my hand and seal this 19th day of September, 1898.

FREDERICK H. DAVIS.

72–14 I hereby approve the foregoing bond for removal and surety.

ALBERT J. CORNISH,
Judge of the District Court, Lancaster County, Nebraska.

Indorsed: District court, Lancaster county, Nebraska. Grand View Building Ass'n, pl'ff, *vs.* The Northern Assurance Co., def't. Bond for removal. Clerk's office, district court. Filed Sep. 20, 1898. Sam. E. Low, clerk district court.

Journal Entry.

That on the 18th day of July, A. D. 1898 (that being the 57th judicial day of the September, A. D. 1898 term of said court) were had and done the following proceedings, as appears upon Court Journal "30" at page "694," to wit:

It is hereby ordered that all causes, matters and motions now pending in this court and not otherwise disposed of be, and the same hereby are continued until the next term of this court.

The May term of this district court was begun on the 2nd day of May, A. D. 1898, and continued from day to day and from time to time, by regular adjournment, until this 8th day of July, A. D. 1898, and now is adjourned without day.

Order.

In the District Court of Lancaster County, Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, Defendant.

This cause came on for hearing on the petition of the Northern Assurance Company of London, England, for the removal of the same to the circuit court of the United States for the district of Nebraska. On consideration whereof the court finds:

That said action is of a civil nature, and that the amount in dispute exceeds the sum of two thousand dollars, exclusive of interest and costs; that the plaintiff is a corporation created under the laws of the State of Nebraska, and doing business therein; that the defendant is a corporation created under the laws of the Kingdom of Great Britain and is non-resident of the State of Nebraska.

The petitioner having offered a good and sufficient surety for its entering into said court and for paying all costs that may be awarded, if said court shall hold that such suit was wrongfully or improperly removed thereto; the said bond being approved, the said cause is ordered removed to the said circuit court of the United States in and for the district of Nebraska.

ALBERT J. CORNISH,
Judge District Court.

Dated Lincoln, Neb., Sept. 29th, 1898.

72–15 Indorsed: 23,265. Grand View Building Ass'n *vs.* Northern Assurance Company. Order for removal. Clerk's office, district court. Filed Sep. 29, 1898. Sam. E. Low, clerk district court.

Certificate.

STATE OF NEBRASKA, *Lancaster County, ss:*

I, Sam. E. Low, clerk of the district court, third judicial district of Nebraska, in and for the county of Lancaster, do hereby certify that the above and foregoing is a true and correct copy of the petition, summons; petition for removal; answer; bond for removal, order of court, with endorsements on each, together with proceedings of trial, adjournment *sine die* of our said court, in a cause therein wherein The Grand View Building Association is plaintiff and The Northern Assurance Company is defendant, as the same appears fully upon the records and files of said court and now in my charge remaining as clerk aforesaid.

In witness whereof I have hereunto set my hand officially and attached the seal of said court at Lincoln, this 29 day of Sept., A. D. 1898.

[SEAL.] SAM. E. LOW, *Clerk D. C.*,
By J. H. MALLALIEU, *Deputy.*

[10-cent internal-revenue stamp.]

Trans. fee, $9.00.

Transcript endorsed: Filed Sep. 30, 1898. Oscar B. Hillis, clerk.

Thereupon afterwards, to wit, on the 5th day of October, 1898, reply was filed in said case, which said reply is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
THE NORTHERN ASSURANCE COMPANY OF LONDON, Defendant.

Reply.

The plaintiff for reply to the answer of defendant herein denies that it procured a policy of insurance in the Firemen's Fund Insurance Company upon the property insured by defendant in violation of the terms of the policy issued by defendant to plaintiff and without the knowledge of defendant; and alleges that the amount of insurance carried on said property by plaintiff was not in any manner increased after issuing of defendant's policy, or during the term of insurance under defendant's policy. The policy referred to in said

72–16 answer, of $1,500.00 in the Firemen's Fund Insurance Company, was, on the contrary, subsisting at and prior to the issuance by defendant to plaintiff of the policy sued on herein, and was in fact issued December 12, 1895, for the term of three years, and the existence of such policy, on the same property covered by defendant's policy, was personally well known to A. D. Borgelt, defendant's recording agent, who wrote said policy and accepted said risk, and who then had full charge of defendant's agency at Lincoln, Nebraska, with authority to accept fire-insurance risks for and on defendant's behalf, to countersign and issue its policies of insurance, and to collect and receive the premiums therefor. And at and prior to his acceptance of said risk and issuance of the policy sued on, the plaintiff's president, H. J. Walsh, reported orally to said A. D. Borgelt, the fact of such subsisting insurance of $1,500.00; and said Borgelt as such agent, with full knowledge of said fact, accepted the risk and wrote, executed and delivered said policy to defendant, with the intent on the part of both plaintiff and defendant that the same should be concurrent with the said subsisting insurance and not avoided or affected thereby, and with purpose and intent of defendant knowingly to waive and forego all benefit of the provisions of said policy set forth in the defendant's answer; and in faith thereof and with the sole purpose to procure such insurance to be concurrent with the said subsisting insurance, and not otherwise, the plaintiff paid, and the defendant procured and received the premium therefor. By all the aforesaid several acts, the defendant has waived all benefit of the particular conditions of its policy prohibiting concurrent insurance, prior and subsequent, except by indorsement on the policy; and defendant is estopped and concluded thereby from claiming any benefit or advantage by reason of said conditions of the policy.

Plaintiff denies that it ever represented to defendant that the property described in and insured by said policy of insurance was of the value of $3,500.00

Wherefore plaintiff prays for judgment as in its petition prayed.

H. F. ROSE,
Attorney for Plaintiff.

STATE OF NEBRASKA, *Lancaster County, ss:*

H. J. Walsh, being first duly sworn, says on oath plaintiff is a corporation, and I am its president, and I believe the facts set forth in the foregoing reply to be true.

H. J. WALSH.

Subscribed in my presence and sworn to before me this first day of October, A. D. 1898.

[SEAL.] WILLARD HAMMOND,
Notary Public.

Indorsed: Filed Oct. 5, 1898. Oscar B. Hillis, clerk.

72-17 Thereupon afterwards, to wit, at the November, 1898, term of said court, and on the 19th day of December, 1898, the following proceedings were had and done in said case, as appear of record in Journal — of said court, to wit:

285, "T."

GRAND VIEW BUILDING ASSOCIATION
vs.
THE NORTHERN ASSURANCE COMPANY OF LONDON.

Jury Trial Begun.

This cause being regularly called for trial, plaintiff appears, by its attorney, H. F. Rose, Esq., and the defendant, by R. W. Breckenridge, Esq. Thereupon, upon motion of plaintiff's said attorney, it is ordered that a jury come, to wit:

Amos Weller,	C. G. Vanness,
J. E. Mendenhall,	W. R. Fuller,
H. Timme,	J. R. Kelsey,
O. J. Davis,	N. H. Meeker,
J. B. Lyons,	Carr Oxford,
E. P. Brewster,	S. D. Jolly,

twelve good and lawful men who are duly sworn and empaneled to try the issues joined herein; thereupon testimony is heard on behalf of the plaintiff, and the trial of said cause not being concluded at the hour of adjournment, it is

Ordered that further proceedings herein be, and they hereby are, postponed until tomorrow morning at 9 o'clock.

Thereupon afterwards, to wit, at the November, 1898, term of said court, and on the 20th day of December, 1898, the following proceedings were had and done in said case, as appear of record in Journal — of said court, to wit:

285, "T."

GRAND VIEW BUILDING ASSOCIATION
vs.
NORTHERN ASSURANCE COMPANY, ETC.

Record of Jury Trial; Special Verdict.

This day also come the parties herein by their respective attorneys, also the jury heretofore duly empanelled and sworn to try the issues joined herein, and after hearing further evidence in said cause, the arguments of said attorneys, and the charge of the court, the jury retire to consider of their verdict, and after due consultation concerning the same, and being fully advised in the premises, they find, and

return into court by their foreman, their verdict, which is in words and figures following, to wit:

72–18 In United States Circuit Court, District of Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
NORTHERN ASSURANCE COMPANY, Defendant.

The jury are instructed to find upon the following questions:

Finding 1. Did the defendant issue to plaintiff the policy of fire insurance mentioned and described in plaintiff's petition?

Answer. Yes.

Finding 2. Was the property covered by said policy of insurance burned on or about June 1, 1898?

Answer Yes.

Finding 3. Did the plaintiff on or about July 26th, 1898, furnish the defendant with proofs of the loss of said property by fire?

Answer. Yes.

Finding 4. Did the policy issued to the plaintiff by the defendant contain the following provisions:

"This entire policy unless otherwise provided by agreement endorsed hereon or added hereto shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

And did said policy also contain the following provision:

"This policy is made and accepted subject to the foregoing stipulations and conditions together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed thereon or added hereto, and as to such provisions and conditions, no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver if any shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached?"

Answer. Yes.

Finding 5. Was there at the time of the insurance of the policy in suit, other insurance upon the insured property in the sum of $1,500 in the Firemen's Fund Insurance Company?

Answer. Yes.

Finding 6. Was A. D. Borgelt the agent of the defendant company to issue policies of insurance and how are his powers defined, and did he issue the policy in question as such agent?

Answer. A. D. Borgelt was recording agent of the Northern Assurance Company at Lincoln, Nebraska, with authority from defendant to countersign and issue its policies and accept fire-insurance risks in its behalf, and collect and receive premiums therefor, and issued the policy sued on as such agent.

Finding. 7. Did A. D. Borgelt know when the policy in 72-19 the defendant company was issued and delivered to plaintiff that there was then $1,500 subsisting insurance in the Firemen's Fund Insurance Company upon the property covered thereby, issued prior to the date of the policy of the defendant company, and was such knowledge communicated to said Borgelt by or on behalf of the assured?

Answer. Yes.

Finding 8. What was the actual cash value of the property covered by the policy in suit which was destroyed by fire June 1, 1898?

Ans. ($4,140.00) four thousand one hundred forty dollars.

Finding 9. Was consent to concurrent insurance of $1,500 endorsed on the policy in suit?

Answer. No.

Finding 10. Did defendant tender a return of the premium paid upon the policy in suit? If so, when and what amount?

Answer. Yes; on August 4, 1898, in the sum of $33.75, being the amount of the premium paid for the policy, and the same was not accepted by plaintiff.

Finding 11. Did the policy sued on contain the following provision: "This company shall not be liable under this policy for a greater proportion of any loss on the described property or for loss by and expense of removal from premises endangered by fire than the amount hereby insured shall bear to the whole insurance."

Answer. Yes.

Finding 12. What was the whole amount of insurance on said property at the time of the loss?

Answer. $4,000.00.

W. H. MEEKER, *Foreman.*

Original verdict endorsed: Filed Dec. 20, 1898. Oscar B. Hillis, clerk.

Thereupon afterwards, to wit, on the 22nd day of December, 1898, plaintiff's motion for judgment on the verdict was filed in said case, which said motion is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
NORTHERN ASSURANCE COMPANY, Defendant.

Motion for Judgment on the Verdict.

1. Plaintiff moves the court for judgment herein in its favor against defendant for the sum of $2,500.00, and interest thereon from commencement of suit, August 30, 1898, and costs, because the facts found by the jury conclusively establish plaintiff's right to recover of defendant the full sum prayed for in the petition.

2. Defendant, by issuing its policy and receiving the 72–20 premium therefor, with knowledge of the existing insurance of fifteen hundred dollars ($1,500.00) in Firemen's Fund Insurance Company, communicated beforehand by assured to A. D. Borgelt, its recording agent, who issued the policy, as by the jury specially found, waived the conditions of said policy set forth in the answer, and is estopped thereby to claim a forfeiture or assert the invalidity of said policy by virtue of said conditions.

HALLECK F. ROSE,
Attorney for Plaintiff.

Indorsed: Filed December 22, 1898. Oscar B. Hillis, clerk.

Thereupon afterwards, to wit, on the 22nd day of December, 1898, defendant's motion for judgment on findings was filed in said case, which said motion is in words and figures following, to wit:

In United States Circuit Court, District of Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
NORTHERN ASSURANCE COMPANY, Defendant.

Motion for Judgment on Findings.

Comes now the defendant and moves the court to render judgment in favor of defendant upon the findings of the jury returned herein.

GREENE & BRECKENRIDGE,
Attorneys for Defendant.

Indorsed: Filed Dec. 22, 1898. Oscar B. Hillis, clerk.

Thereupon afterwards, to wit, at the November, 1898, term of said court, and on the 14th day of January, 1899, the following proceedings were had and done in said case as appear of record in Journal — of said court, to wit:

285, "T."

GRAND VIEW BUILDING ASSOCIATION
vs.
NORTHERN ASSURANCE COMPANY.

Motion Overruled; Judgment.

This cause having heretofore been tried before a jury and a special verdict having been duly rendered and filed herein, and plaintiff having heretofore to wit, on the 22nd day of December, filed its motion for judgment upon said verdict, in its favor and against the defendant; and the defendant, having on the same day filed its motion for judgment upon said verdict, in its favor, and said motions having been fully argued by the attorneys for the respective parties, duly submitted and by the court taken under advisement,

72-21 Now, after due consideration thereof, and being fully advised in the premises, it is by the court

Ordered, that the motion of defendant for a judgment in its favor upon said verdict be and it hereby is overruled and denied.

To which order the defendant excepted.

And it is further ordered by the court that plaintiff's motion for judgment in its favor be and it hereby is sustained.

Thereupon, it is considered, ordered and adjudged by the court that the plaintiff, The Grand View Building Association do have and recover of and from the defendant, The Northern Assurance Company, of London, England, the sum of twenty-five hundred dollars ($2,500.00), with interest thereon at 7% per annum, from September 26th, 1898, besides its costs and disbursements herein taxed at the sum of $45.75, and that it have execution therefor.

And upon motion of defendant's attorneys, it is by the court ordered that defendant be and it hereby is given forty days from and after this date within which to prepare and settle a bill of exceptions.

Thereupon, afterwards, to wit: on the 27th day of January, 1899, bill of costs taxed in favor of Grand View Building Ass'n was filed in said case, which said bill of costs is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

Bill of Costs Taxed in Favor of Grand View Building Ass'n in the Case of—

GRAND VIEW BUILDING ASS'N
vs.
THE NORTHERN ASSURANCE CO.

No. 285, Doc. "T."

Clerk's fees (for items see appearance docket)	$24.90
Witness fees:	
Name, Burt W. Richards, 2 days, 110 miles	8.50
" H. J. Walsh, 2 days, 110 miles	8.50
" Mrs. Ralston, 1 day, 5 miles	1.75
" C. H. Rudge, 1 day, 110 miles	7.00
Attorney's fees, *i. e.*, docket fee, $20.00	20.00
Total	$45.75

UNITED STATES OF AMERICA, *District of Nebraska, ss:*

I, Oscar B. Hillis, clerk of the circuit court of the United States for said district of Nebraska, do hereby certify that the above and foregoing is a true statement of the costs taxed and allowed in favor of Grand View Building Ass'n in the above-entitled case, and that the same are just and legal as I verily believe.

72–22 Witness my hand and the seal of said court this 27th day of Jan'y, 1899.

[SEAL.] OSCAR B. HILLIS, *Clerk,*
By R. C. HOYT, *Deputy.*

Indorsed: Filed Jan. 27, 1899. Oscar B. Hillis, clerk.

Thereupon afterwards, to wit, on the 2nd day of March, 1899, bill of exceptions was filed in said case, which said bill of exceptions is in words and figures following, to wit:

United States Circuit Court of Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
NORTHERN ASSURANCE COMPANY OF LONDON, England, Defendant.

Bill of Exceptions.

Be it remembered that on the trial of this cause in the circuit court of the United States for the district of Nebraska, before the Honorable William H. Munger, and a jury duly impaneled therein, at the November term of said court, on the 19th day of December, 1898, the plaintiff to maintain the issues upon its part offered as a witness H. J. WALSH, who being duly sworn testified that he is president of the Grand View Building Association and was such officer of the plaintiff at the time the policy in suit was issued and acted for and in behalf of the plaintiff in the matter of procuring the issuance of the policy. He dealt with respect thereto with Mr. Borgelt, the agent of the defendant who has an office in the Walsh & Putnam block, in Lincoln, Nebraska. Previous to the date of the policy in suit, witness had conversations with Borgelt both in the office of witness and in Borgelt's office regarding the insurance. The defendant had a previous policy on the water works and powerhouse of the plaintiff, but Borgelt informed witness that the defendant objected to the risk and asked Borgelt to cancel the policy, and witness, wishing to favor Borgelt as he was a tenant of witness, told Borgelt that there was but $1,500.00 insurance on the furniture and it would carry $4,000.00. Witness understood from his book-keeper that there was at that time about $4,800.00 worth of furniture in the building and Borgelt thought he could write the $2,500.00 additional insurance on the furniture and said he would do so. Witness did not procure any further or additional insurance on the subject of insurance covered by the policy in suit after the date of its issuance. Whatever insurance there was on the property was specified at the time this policy was issued and there was no other or different insurance than that which witness has referred to as having been mentioned to Mr. Borgelt. Witness requested Burt Richards, an insurance agent who had the other policy, to confer with Borgelt mbout the insurance before it was written in behalf of plaintiff,
72–23 and witness thinks that Richards was present at some time when he had a conversation with Borgelt about the matter, and Richards and Borgelt conferred about making their policies concurrent.

The policy in suit was delivered to witness by Mr. Borgelt at the office of witness. The premium was paid to Mr. Borgelt. When the policy was delivered witness put it in his safe. Witness never looked at the policy; he supposed it was like all of his policies and

presumed the endorsement permitting concurrent insurance was on the policy and did not know for two or three weeks after the fire but that the policy was all right. The witness gave in detail the various items of personal property which were covered by the policy, and estimated its value at $5,722.49. Witness forwarded an inventory of the goods destroyed, an exact copy of which is attached to the petition in the suit, by registered mail to Mr. Lermit, the manager of the defendant company in Chicago, and received in reply thereto the following letter:

CHICAGO, *Aug.* 2, 1898.

Grand View Building Association, H. J. Walsh, president, Lincoln, Nebraska.

DEAR SIRS: We have your favor of the 26th ult. enclosing to us what purports to be proof of loss, making claim under our policy No. 310,024 of Lincoln, Neb., agency, and issued to you for $2,500 on household furniture, etc., while contained in the three-story brick and stone building on Lot F in Grand View Residence Park addition, on account of a fire which occurred on the 1st day of June, 1898, and beg to say in reply that your sworn statement therein advises us that you had other insurance on this same property to the amount of $1,500. This additional insurance held by you was without the knowledge or consent of this company, and was not permitted by agreement as provided for in lines Nos. 11, 12, and 13 of the printed conditions of our policy, to which we beg to refer you.

We, therefore, regret to have to advise you, and do now hereby say to you that the Northern Assurance Company specifically and absolutely denies any and all liability under said policy No. 310,024, held by you, holding that said policy has been void from the date of its issue by reason of the said provision in regard to other insurance above referred to. Our agents at Lincoln have been instructed to return to you the full premium paid them by you, namely $33.75, at once.

We further beg to say that we are holding your purported proofs of loss, subject to you order.

Yours very truly,

G. H. LERMIT, *Manager*,
By A. E. CLOUGH, *Att'y.*"

The policy was signed by Borgelt & Beasley, and the Borgelt mentioned by witness is of that firm.

The plaintiff thereupon offered the original policy in evidence, which was received without objection, and is as follows:

(Here follows policy marked pp. 26 and 27.)

THE

No. 310024

Northern Assurance Company,

ESTABLISHED 1836.

OF LONDON.

$2,500.00

U. S. OFFICES: BOSTON, CHICAGO, NEW YORK, SAN FRANCISCO.

IN CONSIDERATION OF THE STIPULATIONS HEREIN NAMED AND OF Thirty-three and 75/100 Dollars Premium, does Insure Grand View Building Ass'n, H. J. Walsh, President, for the term of two years, from the 31st day of December, 1896, at noon, to the 31st day of December, 1898, at noon, against all direct loss or damage by fire, except as hereinafter provided.

To an amount not exceeding Twenty-five hundred dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

DWELLING AND HOUSEHOLD FURNITURE FORM.

$ Nothing. On the three story, brick and stone building, with slate roof, and its additions, including foundations and all fixtures and attachments of every description, belonging to said building, while occupied for dwelling purposes only, situated on Lot Five, Grand View Residence Park addition, and occupied as a Boy Military and Boarding Academy.

$2,500.00 On household and Kitchen Furniture of every description, useful or ornamental, bedding, family wearing apparel, watches and jewelry in use, plate and plated ware, musical instruments, sewing machines, printed books and music, pictures, paintings, engravings and mirrors, and their frames (at not exceeding cost), amateur photographic outfit, billiard tables, trunks, garden tools and implements, screens, fuel, and family stores, all while contained in the above described building; also

$ ..... On the ..... story, ... building, with ..... roof, and its additions, including foundations and all fixtures and attachments thereto, situated .....

and occupied .....

$ ..... On .....

$ ..... On .....

NORTHERN ASSURANCE CO. OF LONDON. ESTABLISHED 1836.

This policy shall cover any direct loss or damage caused by LIGHTNING (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy; provided, however, if there shall be any other insurance on said property, this Company shall be liable only pro rata with such other insurance for any direct loss by lightning, whether such other insurance be against direct loss by lightning or not.

Permission is hereby given for the using of a **gasoline stove**; the reservoir to be filled by daylight only, and when the stove is not in use. Warranted by the assured that no artificial light be permitted in the room when the reservoir is being filled, and no gasoline, except that contained in said reservoir, shall be kept within the building, and not more than five gallons in a tight and entirely closed metallic can, free from leak, on the premises adjacent thereto.

Attached to and made part of Policy No. 310024.

BORGELT & BEEZLEY, Agents.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable

Northern Assurance Company, $2,500.00

ESTABLISHED 1836.

OF LONDON.

U. S. OFFICES: BOSTON, CHICAGO, NEW YORK, SAN FRANCISCO.

IN CONSIDERATION OF THE STIPULATIONS HEREIN NAMED AND OF Thirty-three and 75/100 Dollars Premium, does Insure Grand View Building Ass'n, H. J. Walsh, President, for the term of two years, from the 31st day of December, 1896, at noon, to the 31st day of December, 1898, at noon, against all direct loss or damage by fire, except as hereinafter provided.

To an amount not exceeding Twenty-five hundred dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

DWELLING AND HOUSEHOLD FURNITURE FORM.

48-5M-10-94.

$ Nothing. On the three story, brick and stone building, with slate roof, and its additions, including foundations and all fixtures and attachments of every description, belonging to said building, while occupied for dwelling purposes only, situated on Lot Five, Grand View Residence Park addition, and occupied as a Boy Military and Boarding Academy.

$2,500.00 ..... On household and Kitchen Furniture of every description, useful or ornamental, bedding, family wearing apparel, watches and jewelry in use, plate and plated ware, musical instruments, sewing machines, printed books and music, pictures, paintings, engravings and mirrors, and their frames (at not exceeding cost), amateur photographic outfit, billiard tables, trunks, garden tools and implements, screens, fuel, and family stores, all while contained in the above described building; also

$ ..... On the ..... story, ... building, with ..... roof, and its additions, including foundations and all fixtures and attachments thereto, situated .....

..... and occupied .....

$ ..... On .....

..... NORTHERN ASSURANCE CO. OF LONDON, ESTABLISHED 1836.

$ ..... On .....

This policy shall cover any direct loss or damage caused by LIGHTNING (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy; provided, however, if there shall be any other insurance on said property, this Company shall be liable only pro rata with such other insurance for any direct loss by lightning, whether such other insurance be against direct loss by lightning or not.

Permission is hereby given for the using of a **gasoline stove**; the reservoir to be filled by daylight only, and when the stove is not in use. Warranted by the assured that no artificial light be permitted in the room when the reservoir is being filled, and no gasoline, except that contained in said reservoir, shall be kept within the building, and not more than five gallons in a tight and entirely closed metallic can, free from leak, on the premises adjacent thereto.

Attached to and made part of Policy No. 310024.

BORGELT & BEEZLEY, Agents.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee-simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, without the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine or any explosive, phosphorous, or petroleum or any of its products of a more inflammability than kerosene oil of the United States standard, (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days notice of such cancelation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the *pro rata* premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interests as shall be written upon, attached or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustained in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

It is hereby agreed that the capital stock and funds of the company shall alone be liable to answer and make good all demands under or by virtue of this policy, and that no shareholder or member of the company shall be liable to any such demand, nor be in anywise charged or chargeable by reason of this policy beyond the amount unpaid on his or her shares in the company.

This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

In Witness Whereof, this Company, the NORTHERN ASSURANCE COMPANY (a corporation incorporated under the laws of the kingdom of Great Britain and Ireland), has caused these presents to be signed by its Manager at Chicago, acting under Power of Attorney, this 31st day of December, 1896.

But this Policy shall not be valid until countersigned by the duly authorized Agent at Lincoln, Nebr.

COUNTERSIGNED:

G. H. LERMIT, Manager.

BORGELT and BEEZLEY, Agents.

Ex. "6"

72-24 Thereupon the plaintiff to further maintain the issues on its part, produced as a witness BURT W. RICHARDS, who, being duly sworn, testified that he lives in Lincoln, and knows Mr. Walsh and Mr. Borgelt. Witness had conversations with Mr. Walsh and Mr. Borgelt regarding the matter of insurance on furniture in the Worthington academy owned by the plaintiff during the month of December, 1896, and prior to December 31st. Witness was requested by Mr. Walsh to see Mr. Borgelt, and pursuant to that request, saw him. The conversation the witness had with with Borgelt was in Borgelt's office. Mr. Walsh had asked witness to take a certain policy of the Northern Assurance Company, covering the power plant to Mr. Borgelt, and have Borgelt rewrite it upon the furniture of the plaintiff which owned and operated the Worthington Military Academy and for the reason that the Northern Assurance Company had declined to carry the power plant, and Mr. Walsh had made arrangements with witness to write the insurance on the power plant; witness took the policy in the defendant's company, covering the power plant, and went across to Mr. Walsh's office and laid it on his desk, and said to Borgelt, "Mr. Walsh has decided to let you place this policy on the furniture in the Worthington Military Academy, and I will write the power plant myself, inasmuch as your company won't carry it; so you write this up on the furniture concurrent with our policy of $1,500 on the furniture now." The $1,500 policy referred to was in the Firemen's Fund and witness had been the solicitor that had obtained the order for that $1,500 policy.

On cross-examination the witness testified that the conversation referred to took place about the same date when the policy in the defendant company was written and before the delivery of the policy in suit.

Thereupon the plaintiff to further maintain the issues upon its part, called as a witness in its behalf Mrs. RALSTON, who, being duly sworn, testified that she was the matron of the Worthington Military Academy, and testified in detail concerning all items of property which were destroyed by fire, specifying the same items that are set forth at length in the inventory, a copy of which is attached to the petition in the case. The property had, most of it, been in use for a number of years.

Thereupon the plaintiff to further maintain the issues upon its part, called as a witness in its own behalf C. H. RUDGE, who, being duly sworn, testified that he is a member of the Rudge & Morse Company, engaged in the house-furnishing business at Lincoln, where he has been in business for twelve or thirteen years. He knows the Worthington Military Academy and its president, Mr. Walsh; and his house furnished practically all of the furniture and fixtures, outside of the carpets and glassware, which fitted up the Worthington Military Academy owned by the Grand View

Building Association. He has inspected the invoice attached to the original petition, and in his opinion, the items
72–25 thereon are of the reasonable value of seventy-five per cent. of the cost price, as stated in the inventory.

Thereupon the plaintiff rested, and the defendant to maintain the issues upon its part, produced as a witness A. D. BORGELT, who being duly sworn, testified that he is a member of the firm of Borgelt & Beasley, insurance agents at Lincoln, Nabraska, and is a member of the firm of Borgelt & Beasley that wrote the policy in the Northern Assurance Company on the Grand View Building Association. At the time he wrote that policy he had no notice or knowledge that there was other insurance upon the property covered by the policy in suit and the first time he knew of any other insurance was after the fire. Richards and the witness never had any conversation with regard to the writing of the policy in suit. The witness dealt with Mr. Walsh and Mr. Walsh didn't say anything to him about any other insurance. The witness recalls that there was a value placed upon the property that was to be covered by the $2,500 insurance, but he does not remember where he got it from. Witness is recording agent of the defendant in Lincoln and reports his business to Chicago.

On cross-examination the witness testified that he talked to Mr. Walsh about the policy in his office, having previously gone to Mr. Walsh's office to inform him of the cancellation of the other policy, and at that time he told Mr. Walsh that he would like to have him place other insurance with him, and that he would like to carry the risk covered by the policy in suit. Witness was at that time a tenant of Mr. Walsh's building, with an office on the same floor with Mr. Walsh. The policy in suit was written after the cancellation of the previous policy on the power-house of the Grand View Building Association. The power-house policy was not ordered by Mr. Walsh, but was ordered by Mr. Richards from the Farmers' and Merchants' Company, and the talk witness had with Mr. Richards was about the power-house policy. During the conversation between witness and Walsh, Walsh told witness he could have the insurance on the furniture. The policy was in the same amount and the premium was the same that was charged upon the power-house policy. Witness does not remember that Walsh said anything to him about having $1.500 on the furniture and that it would carry more, but he might have mentioned it.

On redirect examination the witness testified that he has no recollection of having known anything about the other insurance until after the fire.

It was stipulated that on August 4, 1898, the premium paid for the policy in suit in the sum of $33.75 was tendered to the plaintiff and that the plaintiff refused to take it.

It was further stipulated that the total amount of insurance upon the property at the time it was destroyed was $4,000.00.

Whereupon the defendant rested.

The defendant moved the court to strike out the evidence relative to and withdraw from the consideration of the jury, the
72-26 items designated in the schedule attached to the petition, "Chemicals and furniture in laboratory," which motion was sustained.

The defendant moved the court to withdraw from the consideration of the jury and to instruct the jury not to consider the items following: "60 desks, $210.00; 27 seats, $152.80; 1 set of charts and globe, $160; gas and electric fixtures, $200; gymnasium fixtures and locker, $100;" also the various bills scheduled as purchased by Rev. A. Hewitt, not itemized, aggregating $602.37, which motion was overruled. Defendant excepted.

No further testimony was offered by either party, both parties rested, and the foregoing is all the testimony offered or given upon the trial of this case.

The defendant thereupon moved the court to instruct the jury to return a verdict for the defendant, which motion was overruled, and defendant excepted.

Thereupon afterwards and after arguments of counsel, the court instructed the jury as follows:

Instructions to the Jury.

GENTLEMEN OF THE JURY:

As you have discovered during the progress of this trial, there are one or two legal questions involved, and the court has thought it advisable rather than to pass upon them with a hurried examination, which, if the conclusion I should arrive at now should be afterwards found to be wrong would result in a retrial, to submit to you special findings for you to pass upon, and then the court can upon those findings render such a judgment as after more mature reflection and consideration of the legal questions involved shall seem to be right and proper.

Most of the questions submitted to you for answer there is no dispute about between the parties, and you are directed by the court to answer them in the manner in which they have been answered, in other words, as they are inserted.

They are as follows:

"(1.) Did the defendant issue to plaintiff the policy of fire insurance mentioned and described in plaintiff's petition?"

There is no dispute about that, so that is answered, "Yes."

"(2.) Was the property covered by said policy of insurance burned on or about June 1, 1898?"

There is no dispute about that, so that is answered, "Yes."

"(3.) Did the plaintiff on or about July 26th, 1898, furnish the defendant with proofs of the loss of said property by fire?"

There is no dispute about that and that is answered, "Yes."

"(4.) Did the policy issued to the plaintiff by the defendant contain the following provisions:

'This entire policy unless otherwise provided by agreement endorsed hereon or added hereto shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy.'

72-27 And did said policy also contain the following provision:

'This policy is made and accepted subject to the foregoing stipulations and conditions together with such other provisions agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver if any shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached?' "

There is no dispute about that, so that is answered, "Yes."

"(5.) Was there at the time of the issuance of the policy in suit, other insurance upon the insured property in the sum of $1,500 in the Fireman's Fund Insurance Company?"

There is no dispute about that and that is answered, "Yes."

"(6.) Was A. D. Borgelt the agent of the defendant company to issue policies of insurance and how are his powers defined; and did he issue the policy in question as such agent?"

There being no dispute about that, the proper answer that is written in is as follows:

"Answer. A. D. Borgelt was recording agent of the Northern Assurance Company, at Lincoln, Nebraska, with authority from defendant to countersign and issue its policies and accept fire-insurance risks in its behalf, and collect and receive premiums therefor, and issued the policy sued on as such agent."

"(7.) Did A. D. Borgelt know when the policy in the defendant company was issued and delivered to plaintiff that there was then $1,500 subsisting insurance in the Fireman's Fund Insurance Company upon the property covered thereby, issued prior to the date of the policy of the defendant company, and was such knowledge communicated to said Borgelt by or on behalf of the assured?"

That is a disputed proposition, so that you must answer that question. The word "answer" is written under the question, and you will write after the word "answer," either yes or no. That question is susceptible of being answered by the simple word yes or no.

"Did A. D. Borgelt know when the policy in the defendant company was issued and delivered to plaintiff that there was then $1,500 subsisting insurance in the Fireman's Fund Insurance Company upon the property covered thereby, issued prior to the date of the policy of the defendant company, and was such knowledge com-

municated to said Borgelt by or on behalf of the assured?" That is the first question which is disputed and which you are required to answer, and that can be answered by the simple answer yes or no.

"Finding 8. What was the actual cash value of the prop-
72-28 erty covered by the policy in suit which was destroyed by fire June 1, 1898?"

That is a disputed question and that is for you to determine what was the actual cash value at that time.

"(9.) Was consent to concurrent insurance of $1,500 endorsed on the policy in suit?"

There is no dispute about that, so that is answered "No."

"(10.) Did defendant tender a return of the premium paid upon the policy in suit? If so, when and what amount?"

There is no dispute about that, so that is answered as follows:

"Yes; on August 4, 1898, in the sum of $33.75, being the amount of the premium paid for the policy, and the same was not accepted by plaintiff."

"(11.) Did the policy sued on contain the following provision:

"This company shall not be liable under this policy for a greater proportion of any loss on the described property or for loss by and expense of removal from premises endangered by fire than the amount hereby insured shall bear to the whole insurance?"

There is no dispute about that and that is answered "Yes."

"(12.) What was the whole amount of insurance on said property at the time of the loss?"

There is no dispute about that and that is answered as follows:

"$4,000.00."

So you see there is no dispute except upon two of these propositions; the others are all answered; and you are to find upon these two propositions, the one as to whether or not the agent, Mr. Borgelt, knew of this previous insurance at the time of the issuing of this policy, and the other as to the actual cash value of the property destroyed.

The burden of proof rests upon the plaintiff to establish by a preponderance of the evidence these two propositions. By a preponderance of the testimony is not meant necessarily the greatest number of witnesses, but it is that evidence which is most convincing to your mind. If the evidence on the part of the plaintiff is more convincing, the truthfulness of it, than it is on the part of the defendant, then the preponderance of evidence is established. If it is not the most convincing, if the evidence is equally balanced to your minds that it is the same upon one side as it is upon the other, equally balanced, so as to leave an uncertainty, then the proof is not established by a preponderance of the testimony.

And the same way the burden is upon the plaintiff to establish by a preponderance of the evidence the value of the property.

Now, in determining the actual cash value of the property the parties provided in the policy how that was to be done, as follows:

"This company shall not be liable beyond the actual cash value

of the property at the time any loss or damage occurs and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the in-
72–29 sured to repair or replace the same with material of like kind and quality."

That is the manner in which they have agreed to determine what was the actual cash value, taking the property and deducting the proper amount for depreciation, and in no event is it to exceed what it would cost to replace the property in the same condition it was at the time of the fire and the loss.

Now, the credibility of the witnesses is a matter for you to determine. In determining the credibility, when you come to the testimony of any of the witnesses you are to take into consideration their demeanor upon the witness stand, their candor, the fairness with which they give their testimony, their interest or want of interest in the result of the suit, and all of these matters, the probability or improbability of their statement, all these are matters for you to consider in determining the credibility to be given to the testimony of the various witnesses.

I do not see how I can enlighten you further or say anything that would aid you in arriving at a correct conclusion on these two propositions left for your consideration. When you have agreed you will write in your answers and have your foreman sign above where I have written the word "foreman." The parties have consented that you may take this transcript of the record from the State court which contains here the list of the items. I have withdrawn from your consideration the item designated by pencil marks on each side, so you will have no difficulty in finding it.

It is the only one that is designated by pencil marks. It is the item of "chemicals and furniture in laboratory." That item is a matter you are not to take into consideration, as the court decides that it is not covered by the policy.

You can retire in charge of a bailiff.

On December 20, 1898, said jury returned their findings to the court as follows:

In United States Circuit Court, District of Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
NORTHERN ASSURANCE COMPANY, Defendant.

The jury are instructed to find upon the following questions:

Finding 1. Did the defendant issue to plaintiff the policy of fire insurance mentioned and described in plaintiff's petition?

Answer. Yes.

Finding 2. Was the property covered by said policy of insurance burned on or about June 1, 1898?

Answer. Yes.

Finding 3. Did the plaintiff on or about July 26th, 1898, furnish the defendant with proofs of the loss of said property by fire?

Answer. Yes.

Finding 4. Did the policy issued to the plaintiff by the defendant contain the following provisions:

72-30 "This entire policy (—) otherwise provided by agreement endorsed thereon or added thereto shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

And did said policy contain the following provision:

"This policy is made and accepted subject to the foregoing stipulations and conditions together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Answer. Yes.

Finding. 5. Was there at the time of the issuance of the policy in suit, other insurance upon the insured property in the sum of $1,500 in the Firemen's Fund Insurance Company?

Answer. Yes.

Finding 6. Was A. D. Borgelt the agent of the defendant company to issue policies of insurance and how are his powers defined, and did he issue the policy in question as such agent?

Answer. A. D. Borgelt was recording agent of the Northern Assurance Company at Lincoln, Nebraska, with authority from defendant to countersign and issue its policies and accept fire-insurance risks in its behalf and collect and receive premiums therefor, and issued the policy sued on as such agent.

Finding 7. Did A. D. Borgelt know when the policy in the defendant company was issued and delivered to plaintiff that there was then $1,500 subsisting insurance in the Firemen's Fund Insurance Company upon the property covered thereby, issued prior to the date of the policy of the defendant company, and was such knowledge communicated to said Borgelt by or on behalf of the assured?

Answer. Yes.

Finding 8. What was the actual cash value of the property cov-

ered by the policy in suit which was destroyed by fire June 1, 1898?

Answer. ($4,140.00) four thousand one hundred and forty dollars.

Finding 9. Was consent to concurrent insurance of $1,500 indorsed on the policy in suit?

Answer. No.

Finding 10. Did the plaintiff tender a return of the premium paid upon the policy in suit? If so, when and what amount?

72–31 Answer. Yes; on August 4, 1898; in the sum of $33.75, being the amount of the premium paid for the policy, and the same was not accepted by plaintiff.

Finding 11. Did the policy sued on contain the following provision:

"This company shall not be liable under this policy for a greater proportion of any loss on the described property or for loss by and expense of removal from premises endangered by fire than the amount hereby insured shall bear to the whole insurance."

Answer. Yes.

Finding 12. What was the whole amount of insurance on said property at the time of the loss?

Answer. $4,000.00.

N. H. MEEKER, *Foreman.*"

Whereupon afterwards and on December 22nd, 1898, the defendant moved for judgment in its favor upon the findings of the jury and on the same day the plaintiff moved for judgment in its favor upon the findings and special verdict of the jury; and thereupon afterwards and on January 14th, 1899, the motion of the plaintiff for judgment upon the findings of the jury aforesaid was sustained and the defendant excepted and the motion of defendant for judgment in its favor upon said findings was overruled and the defendant excepted thereto; and afterwards, on February 6th, 1899, the defendant by leave of court filed its petition for a new trial; and thereupon thereafter the said cause was submitted to the court for its ruling and judgment upon said defendant's motion to set aside the special findings, verdict and judgment therein.

It is stipulated by and between the parties hereto that the foregoing bill of exceptions contains all the evidence offered or given in said cause and is a true bill of exceptions and may be allowed by the court as such in this cause.

Feb'y 23, 1899.

HALLECK F. ROSE,
Attorney for Plaintiff.
GREENE & BRECKENRIDGE,
Attorneys for Defendant.

And now on this 25th day of February, 1899, the foregoing bill of exceptions is duly allowed by me and ordered to be made a part of the records in this cause.

W. H. MUNGER, *Judge.*

Indorsed: Filed Mar. 2, 1899. Oscar B. Hillis, clerk.

Thereupon, afterwards, to wit: on the 2nd day of March, 1899, assignment of errors was filed in said case, which said assignment of errors is in words and figures following, to wit:

72–32 United States Circuit Court of Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
NORTHERN ASSURANCE COMPANY OF LONDON, Defendant.

Now comes The Northern Assurance Company of London, the above-named defendant and plaintiff in error, and assigns the following errors in the record and proceedings in the above-entitled cause as follows:

1. The court erred in overruling the defendant's motion at the close of all evidence for an instruction to the jury to return a verdict in favor of defendant.
2. The court erred in overruling the motion of the defendant for judgment upon the findings of the jury.
3. The court erred in sustaining the motion of the plaintiff for judgment upon the findings of the jury.
4. The court erred in rendering judgment in favor of the plaintiff and against the defendant.

Wherefore, the defendant and plaintiff in error prays for a reversal of the said judgment and for such relief as it is of right entitled to have.

CHARLES J. GREENE AND
RALPH W. BRECKENRIDGE,
Attorneys for Defendant and Plaintiff in Error,
Northern Assurance Company of London.

Indorsed: Filed Mar. 2, 1899. Oscar B. Hillis, clerk.

Thereupon afterwards, to wit, on the said 2nd day of March, 1899, petition for writ of error and order allowing same was filed in said case, which said petition is in words and figures following, to wit:

United States Circuit Court, District of Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
v.
NORTHERN ASSURANCE COMPANY OF LONDON, Defendant.

Petition for Allowance of Writ of Error.

To the honorable judges of the circuit court of the United States for the district of Nebraska:

The defendant in the above-entitled cause, conceiving itself aggrieved and prejudiced in various orders and rulings of the court in said cause, and alleging divers grievous and prejudicial errors of the court in making such orders and rulings, files herewith an assignment of the errors complained of and prays for an allowance of a writ of error in said cause to the United States circuit court of appeals for the eighth circuit, and that a transcript of the records and proceedings, duly authenticated, be sent to the said court.

NORTHERN ASSURANCE COMPANY
OF LONDON,
By CHARLES J. GREENE AND
RALPH W. BRECKENRIDGE,
Its Attorneys.

72–33 On to wit, this 25th day of February, 1899, it is ordered that a writ of error be allowed as prayed for and supersedeas bond is fixed at the sum of $2,500.00 *dollars.*

W. H. MUNGER,
United States District Judge

Indorsed: Filed Mar. 2, 1889. Oscar B. Hillis, clerk.

Thereupon afterwards, to wit, on the 2nd day of March, 1899, bond was filed in said case, which said bond is in words and figures following, to wit:

Know all men by these presents, that we, Northern Assurance Company of London and Frederick H. Davis, are held and firmly bound unto Grand View Building Association, in the full and just sum of thirty-five hundred dollars, to be paid to the said Grand View Building Association, its successors or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this second day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas, lately at the November term A. D. 1898, of the circuit court of the United States for the district of Nebraska, in a suit depending in said court between Grand View Building Association, plaintiff, and Northern Assurance Company of London, defendant,

judgment was rendered against the said Northern Assurance Company of London, and the said Northern Assurance Company of London, *has* obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Grand View Building Association citing and admonishing it to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation:

Now the condition of the above obligation is such, that if the said Northern Assurance Company of London shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

NORTHERN ASSURANCE COMPANY
OF LONDON, [SEAL.]
By GREENE & BRECKENRIDGE, [SEAL.]
Its Attorneys.
FREDERICK H. DAVIS. [SEAL.]

Sealed and delivered in presence of—

——— ———.

Approved by—
WM. H. MUNGER, *Judge.*

Indorsed: Filed Mar. 2, 1899. Oscar B. Hillis, clerk. No. 285, "T." United States circuit court, district of Nebraska.
72–34 Grand View Building Association *vs.* Northern Assurance Company of London. Bond, $3,500.00.

Thereupon afterdwards, to wit, on the 2nd day of March, 1899, a writ of error was issued and filed in said case, and a certified copy of such writ of error filed and lodged in the clerk's office, by the plaintiff in error for the defendant in error, and a citation duly signed and returned and filed on the 2nd day of March, 1899, with proof of service endorsed thereon. The following are the originals:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Nebraska, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the November term, 1898, thereof, between Grand View Building Association and Northern Assurance Company of London, a manifest error hath happened, to the great damage of the said Northern Assurance Company of London, England, as by its complaint appears, we, being willing that error, if any hath been, should

be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, on or before the 26th day of April, 1899, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 2nd day of March, in the year of our Lord one thousand eight hundred and ninety-nine. Issued at office in the city of Omaha, Nebraska, with the seal of the circuit court of the United States for the district of Nebraska, dated as aforesaid.

Seal United States Circuit Court, District of Nebraska.

OSCAR B. HILLIS,
Clerk Circuit Court United States, District of Nebraska.

Allowed by—
W. H. MUNGER, *Judge.*

72–35 *Return to Writ.*

UNITED STATES OF AMERICA, *District of Nebraska, ss:*

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals for the eighth circuit, a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name, and affix the seal of said circuit court, at office in the city of Omaha, this 31st day of March, A. D. 1899.

Seal United States Circuit Court, District of Nebraska.

OSCAR B. HILLIS,
Clerk of said Court.

No. 285, "T." United States circuit court, district of Nebraska. Grand View Building Association *vs.* Northern Assurance Company. Writ of error to the circuit court of the United States for the district of Nebraska. Filed Mar. 2, 1899. Oscar B. Hillis, clerk.

The United States of America to Grand View Building Association, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein Northern Assurance Company, of London, (England), is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorablle William H. Munger, judge of the circuit court of the United States for the district of Nebraska, this 25th day of February, in the year of our Lord one thousand eight hundred and ninety-nine.

WM. H. MUNGER,
United States District Judge for the District of Nebraska.

I hereby accept service of the within citation this 27th day of February, 1899, for and on behalf of Grand View Building Association.

HALLECK F. ROSE,
Attorney for Plaintiff and Defendant in Error.

No. 285, T. United States circuit court, district of Nebraska. Grand View Building Association *vs.* Northern Assurance Company of London. Citation. Filed Mar. 2, 1899. Oscar B. Hillis, clerk.

72–36 UNITED STATES OF AMERICA, *District of Nebraska, ss:*

Pursuant to the foregoing writ of error and in obedience thereto, I, Oscar B. Hillis, clerk of the circuit court of the United States for the district of Nebraska, do hereby certify that the foregoing pages from one (1) to fifty-nine (59) inclusive, contain true and faithful transcripts of all the pleadings, process and proceedings of record and on file in said court, in the case of Grand View Building Association *vs.* The Northern Assurance Company of London, England, No. 285, docket "T," and that copies of the writ of error and citation duly certified have been lodged and remain in my said office as such clerk.

Seal United States Circuit Court, District of Nebraska.

Witness my hand and the seal of said circuit court, at Omaha in said district, this 31st day of March, A. D. 1899.

OSCAR B. HILLIS, *Clerk.*

[Cancelled 10-c. U. S. rev. stamp.]

Filed Apr. 10, 1899.

JOHN D. JORDAN, *Clerk.*

(*Appearance for Plaintiff in Error.*)

And on the eleventh day of April, A. D. 1899, an appearance of counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit.

No. 1248. December Term, 1898.

NORTHERN ASSURANCE CO., Plaintiff in Error,
vs.
GRAND VIEW BUILDING ASSOCIATION.

The clerk will enter *my* appearance as counsel for the plaintiff in error.

CHARLES J. GREENE.
RALPH W. BRECKENRIDGE.

(Endorsed:) U. S. circuit court of appeals, eighth circuit, December term, 1898. No. 1248. Northern Assurance Company, plaintiff in error, *vs.* Grand View Building Association. Appearance. Filed Apr. 11, 1899. John D. Jordan, clerk. Charles J. Greene, Ralph W. Breckenridge, counsel for pl'ff in error.

(*Appearance for Defendant in Error.*)

And on the twenty-ninth day of May, A. D. 1899, an appearance of counsel for defendant in error was filed in the clerk's office of said circuit court of appeals in the words and figures following:

72–37 United States Circuit Court of Appeals, Eighth Circuit.

No. 1248. May Term, 1899.

NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, Plaintiff in Error,
vs.
GRAND VIEW BUILDING ASSOCIATION.

The clerk will enter my appearance as counsel for the defendant in error.

HALLECK F. ROSE.

(Endorsed:) U. S. circuit court of appeals, eighth circuit, May term, 1899. No. 1248. Northern Assurance Co. of London, England, plaintiff in error, *vs.* Grand View Building Association. Appearance. Filed May 29, 1899. John D. Jordan, clerk. Halleck F. Rose, counsel for def't in error.

(Stipulation as to Order Overruling Petition for New Trial.)

And on the thirtieth day of June, A. D. 1899, a stipulation as to order overruling petition for new trial was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 1248. Stipulation.

NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, Plaintiff in Error,
v.
GRAND VIEW BUILDING ASSOCIATION, Defendants in Error.

Come now the parties hereto and stipulate that the petition for a new trial filed with leave of court on February 6, 1899, and referred to on page 37 of the printed record herein, was duly overruled, and both parties hereto waive any point which either might make upon the printed record as it stands that the judgment herein sought to be reversed is not shown by the printed record to be final because of the pendency of the petition for a new trial.

NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, *Plaintiff in Error,*
By GREENE & BRECKENRIDGE, *Its Attorneys.*
GRAND VIEW BUILDING ASSOCIATION, *Defendant in Error,*
By HALLECK F. ROSE, *Its Attorney.*

(Endorsed:) No. 1248. United States circuit court of appeals, eighth circuit. Northern Assurance Company of London, England, pl'ff in error, *v.* Grand View Building Association, def't in error. Stipulation as to order overruling petition for new trial. Filed Jun- 30, 1899. John D. Jordan, clerk. Greene & Breckenridge, attorneys for pl'ff.

72-38 *(Order of Submission.)*

And on the eleventh day of December, A. D. 1899, in the record of the proceedings of said circuit court of appeals, is an order of submission of said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1899.

MONDAY, *December* 11, 1899.

THE NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, Plaintiff in Error,

vs.

THE GRAND VIEW BUILDING ASSOCIATION.

In error to the circuit court of the United States for the district of Nebraska.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Ralph W. Breckenridge in behalf of the plaintiff in error, continued by Mr. Halleck F. Rose for the defendant in error, and concluded by Mr. Ralph W. Breckenridge for the plaintiff in error.

Thereupon the cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

(*Opinion.*)

And on the twenty-sixth day of March, A. D. 1900, an opinion of said United States circuit court of appeals was filed in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit

No. 1248. December Term, A. D. 1899.

NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, Plaintiff in Error,

vs.

GRAND VIEW BUILDING ASSOCIATION, Defendant in Error.

In error to the circuit court of the United States for the district of Nebraska.

Mr. Ralph W. Breckenridge (Mr. Charles J. Greene was with him on the brief) for plaintiff in error.

Mr. Halleck F. Rose for the defendant in error.

Before Caldwell, Sanborn, and Thayer, circuit judges.

THAYER, circuit judge, delivered the opinion of the court:

The general question which arises in this case is whether an insurance company should be permitted to take advantage of
72–39 a condition contained in one of its policies, to avoid the payment of a loss that has been sustained thereunder, when it

appears that the fact rendering the policy void by the terms of the condition which is pleaded as a defense was an existent fact known to the insurer at the time it issued its policy and accepted the premium, which for that reason rendered the policy void, if at all, from the moment it was delivered. The question arises in this way. The Northern Assurance Company of London, England, the plaintiff in error, insured certain household and kitchen furniture belonging to The Grand View Building Association, the defendant in error, that was situated in a certain building in the city of Lincoln, Nebraska. The policy which it issued contained the following provisions:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

At the time the policy in suit was executed the insured property was covered to the amount of $1,500.00 by a policy issued by the Firemen's Fund Insurance Company. A jury found that an agent of the plaintiff in error by the name of A. D. Borgelt, who had authority to make contracts of insurance in its behalf and to countersign and issue its policies and collect premiums thereon, and who solicited the policy in suit—had knowledge of the existence of the policy issued by the Firemen's Fund Insurance Company at the time he issued the policy in suit, but no indorsement appears to have been made upon the policy in suit relative to the existence of the prior policy. A fire having occurred by which the insured property was totally destroyed and an action having been brought against the plaintiff in error, which was the defendant below, to recover the amount of the loss, it pleaded the aforesaid provisions of its policy and the existence of the prior insurance as a defense to the action. The verdict below was special and on the state of facts heretofore recited, which were either found by the jury or disclosed by the record, the trial court rendered a judgment against the insurer which it seeks to reverse.

The general question stated at the outset of this opinion has been

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answered in the negative in many well-considered decisions. It was so answered by this court in Firemen's Fund Insurance Co. *v.* Norwood, 32 U. S. App., 490; 69 Fed. Rep., 71, and the same conclusion has been reached in other circuits. Thus, in the case of London & Lancashire Fire Ins. Co. *v.* Fischer, — U. S. App., —; 34 C. C. A., 503; 92 Fed. Rep., 500 (decided by the circuit court of appeals of the sixth circuit), it was said to be "well settled in the law of fire insurance that the insurer is estopped to plead as a defense the breach of conditions against other insurance or incumbrances without the consent of the company in writing on the face of the policy, if it appears that when the agent of the company with authority to deliver or withhold policies delivered the policy in question he then knew of the existence of the other insurance or the incumbrance." The same doctrine was enforced by the circuit court of appeals for the ninth circuit in the case of McElroy *v.* British American Assurance Co. of Toronto, Canada, — U. S. App. —; 36 C. C. A., 615; 94 Fed. Rep., 990, wherein it appeared that an agent of an insurance company had issued a policy with knowledge of an existing incumbrance on the insured property and had failed to endorse the fact on the policy, although it contained a provision in substance that it should be void if there was a mortgage on the property unless the consent of the insurer thereto was shown by a written endorsement on its policy. It was also held by the circuit court of appeals for the fourth circuit in the case of Glover *v.* National Fire Insurance Company of Baltimore, — U. S. App., —; 30 C. C. A., 95; 85 Fed. Rep., 125, that the fact that the insured property was erroneously described as a "dwelling-house" when it should have been described as a "Keely Institute," which would have rendered it a more hazardous risk—would not avail the insurer as a defense to its policy when a loss had occurred, it appearing that the agent of the insurance company had knowledge of the misdescription when he solicited the risk and issued the policy. And in Putnam *v.* Commonwealth Ins. Co., 4 Fed. Rep., 753, Judge Blatchford held, after a careful review of the authorities, that an insurance company could not take advantage of a provision in its policy rendering it void if there was other concurrent insurance not endorsed thereon, when it was proven that its soliciting agent had knowledge of existing insurance on the insured property to the amount of $6,000 at the time he issued its policy and only endorsed thereon permission to carry other concurrent insurance to the amount of $3,000.00.

The point now under consideration has been adjudicated so frequently that it is doubtless unnecessary to do more than refer to the cases already mentioned and the authorities therein cited. We will call attention, however, to the fact that the doctrine as heretofore stated has the approval of the supreme court of the State of Nebraska, from which State this case comes, and is also stated and reinforced by numerous citations by the leading text-writers on the law of insurance. Home Fire Ins. Co. of Omaha *v.* Hammang

Bros. & Co., 44 Neb., 566; Joyce on Insurance, sec. 515; Ostrander on Fire Insurance, sec. 243; May on Insurance, 2nd ed., sec. 497.

72-41 The doctrine in question rests upon the ground that facts made known to the agent of an insurance company who is empowered by it to solicit insurance, countersign and issue policies and collect premiums, is the knowledge of his principal and that a fraud would be perpetrated if an insurance company, through the medium of its agents, was allowed to deliver one of its policies and accept the premium thereon with knowledge of facts which under its provisions rendered it void *ab initio*. To prevent the perpetration of such frauds the courts have very generally held the insurer estopped from taking advantage of a condition or conditions found in one of its issued policies which in the light of known facts rendered the same void from the time of its delivery, or they have indulged in the charitable presumption that the insurer intended to waive the benefit of such a provision or that through accident or mistake it failed to modify the condition before the delivery of its policy, as it intended to do, so as to render it valid.

It is contended, however, in behalf of the insurer that by virtue of the conditions of its policy above quoted the rule of law heretofore stated is inapplicable to the case in hand. It is said, in substance, that no provision of its policy as printed and delivered to the insured can be denied its legitimate force and effect except by virtue of a written indorsement on the policy; that the insurance company has effectually deprived itself of the power to waive any of the conditions of its policy except by a written indorsement thereon, and that it has succeeded in framing a contract which is wholly exempt from the equitable doctrine of estopel and waiver. This court decided, however, in Firemen's Fund Insurance Co. *v.* Norwood, 32 U. S. App., 490, 499; 69 Fed. Rep., 71, that "parties to contracts cannot disable themselves from making a contract allowed by law in any mode in which the law allows contracts to be made," and that "a written contract may be changed by parol and a parol one changed by a writing despite any provision in the contract to the contrary;" and the law to that effect is, as we think, well established by the authorities there cited as well as by other authorities that are referred to in Farnum *v.* Phœnix Ins. Co., 83 Cal., 246, 261. It has also been held that such clauses as those that are relied upon by the insurer to deprive itself of the power to contract otherwise than by some writing, should be given effect, if it all, as they respect such modifications of a policy as are made or attempted to be made after it has been delivered and taken effect as a valid instrument and that they should not be considered as having relation to acts done by the company or its agents at the inception of the contract which are sufficient, notwithstanding provisions that it may contain, to render it valid through the operation of the doctrine of estoppel or waiver. Walsh *v.* Hartford Fire Ins. Co., 73 N. Y., 5, 11; Woodruff *v.* Imperial Fire Ins. Co. of London, England, 83 N. Y., 134, 141; Mutual Benefit Life Ins. Co. *v.* Robison, 19

U. S. App., 266, 274; 58 Fed. Rep., 723, 728. When an insurance company delivers a policy and accepts the premium thereon it is presumed that its intention is to make a contract which, in the light of all facts then known to it, will afford indemnity and it is beyond its power, by any provision that may be found in its policy, 72–42 to overcome the force of that presumption or to avoid the effect of acts or declarations which from an equitable standpoint are sufficient to raise an estoppepl *in pais*. Thus, in the case of Wood *v.* American Fire Ins. Co., 149 N. Y., 382, it appeared that an agent of the insurance company issued a policy with knowledge of a fact which under its terms rendered it void *ab initio*, but notwithstanding the fact that the policy in suit was a standard policy which contained conditions similar to those that are invoked in the case at bar, it was held that the condition under which the forfeiture was asserted must be regarded as having been waived, as otherwise the insurer would be put in the attitude of accepting a premium for a policy which was known at the time to be of no force and effect. The court said, in substance, that it had long been settled that general agents of an insurance company may waive stipulations and provisions contained in a policy with respect to the conditions upon which it shall have inception and go into operation as a contract, by delivering it with knowledge of all the facts and receiving the premium. A similar ruling was made in Robbins *v.* Springfield Fire Ins. Co., 149 N. Y., 477, where a policy was issued by the agent of an insurance company with knowledge of the existence of an incumbrance on the insured property, which fact was not indorsed in writing on the policy as it should have been by the terms thereof to render it operative. The policy in that case contained a provision to the effect that no officer, agent or other representative of the company should have power to waive any condition or provision thereof, except such as might by the terms of the policy be indorsed thereon or added thereto, and that no such officer or agent should be deemed to have waived any provision of the policy unless the waiver was written thereon. Nevertheless, it was ruled that the insurance company had either waived the condition rendering the policy void or was estopped by the conduct of its agent from pleading the condition and the existence of the incumbrance as a defense. And in the case of Farnum *v.* Phœnix Ins. Co., 83 Cal., 246, 259, it was also held, in substance, that an insurance company was estopped from denying that one of its policies had taken effect when it appeared that it had been delivered by one of its agents who had power to deliver policies and who had extended credit for the premium by an oral agreement, although the policy contained a provision that the company should not be liable thereon until the premium was paid and a further provision that nothing less than a specific agreement indorsed on the policy should operate as a waiver of any of its provisions.

We are of opinion, therefore, that the delivery by the agent of the insurance company of the policy in suit with knowledge at the time

of the existence of the prior insurance estops the insurer from pleading the prior insurance as a defense. Its agents by whom the delivery of the policy was made had power to deliver it and collect the premium and to receive notice of any existing insurance. In doing these acts he was for the time being the company and no obligation rested on the insured to insist that the existence of the outstanding insurance should be indorsed on the policy in
72–43 suit if the insurer, with knowledge of its existence, did not elect to do so but delivered the contract without such indorsement. He had the right to assume because of the delivery of the policy under the circumstances aforesaid that the insurer had determined to accept the risk notwithstanding the other insurance.

The point seems to be made in the brief that the plaintiff below in its petition and reply pleaded a waiver and that the judgment below cannot be supported because it is founded on estoppel. With reference to this suggestion it is only necessary to say that the plaintiff pleaded the facts and circumstances under which the policy was issued and the knowledge possessed by the insurer at the time, substantially as hereinbefore set forth, and in view thereof alleged that the defendant company had not only *waived* the provision of its policy on which it relied as a defense but was also *estopped* from asserting it. We perceive no error in this method of pleading, nor was any exception taken thereto in the trial court.

Judgment below is accordingly *affirmed*.

SANBORN, *Circuit Judge*, dissenting:

The question which this case presents has long been the subject of conflicting decisions. In Carpenter *v.* Providence Washington Ins. Co., 16 Pet., 495, 496, 511, the policy contained this stipulation: "And provided further, that in case the insured shall have already any other insurance on the property hereby insured, not notified to this corporation and mentioned in or endorsed upon the policy, then this insurance shall be void and of no effect." There was other insurance upon the property at the time this policy was issued. Mr. Justice Story expressed the unanimous opinion of the Supreme Court upon the question in controversy in this case in these words: "The third instruction prayed the court to instruct the jury, that if the Washington Insurance Company had notice, in fact, of the existence of the policy in the American office, that 'was, in law, a compliance with the terms of the policy.' The court refused to give the instruction as prayed, but instructed the jury, that at law, whatever might be the case at equity, mere parol notice of such insurance was not, of itself, sufficient to comply with the requirements of the policy declared on; but that it was necessary, in case of any such prior policy, that the same should not only be notified to the company, but should be mentioned in or indorsed upon the policy; otherwise the insurance was to be void and of no effect. We think this instruction was perfectly correct. It merely expresses the very language and sense of the stipulation in the policy; and it can never be properly said

that the stipulation in the policy is complied with, when there has been no such mention or indorsement as it positively requires, and without which it declares the policy shall henceforth be void and of no effect." This decision was rendered in 1842, has never been overruled, and in 1897 the circuit court of appeals for the seventh circuit reached the same conclusion. Union National Bank *v.* German Ins. Co., 34 U. S. App., 397, 402; 18 C. C. A., 203, 206; 71 Fed. Rep., 473, 476; United Firemen's Ins. Co. *v.* Thomas, 53
72–44 U. S. App., 517, 521; 27 C. C. A., 42, 44; 82 Fed. Rep., 406, 408.

A careful reading of the cases upon both sides of the question has forced my mind to the conclusion that the supreme court and the circuit court of appeals for the seventh circuit are right and for the following reasons:

1. If the solicitor of this company had had unlimited power to act for it, had known of the prior insurance and had made a parol agreement or representation before or at the time of the delivery of the policy that the policy should be valid without the indorsement of the permission to carry the prior insurance, that agreement or representation would have been futile and the written stipulation that the policy was void without the indorsement would have prevailed over the parol contract under the familiar rule that all prior and cotemporaneous oral negotiations are merged in the written agreement. Since the decision in Firemen's Fund Ins. Co. *v.* Norwood, to which the writer has never assented, this court has frequently held that no representation, promise or agreement made, or opinion expressed in the previous parol negotiations as to the terms or legal effect of the resulting written agreement can be permitted to prevail over the plain provisions and just interpretation of the written contract. Insurance Co. *v.* Henderson, 32 U. S. App., 536, 540, 543, 547; 16 C. C. A., 390, 391, 393, 395; 69 Fed. Rep., 762, 764, 766; New York Life Ins. Co. *v.* McMaster, 57 U. S. App., 638, 648-652; 30 C. C. A., 532, 538-540; 87 Fed. Rep., 63, 69-72; Insurance Co. *v.* Mowry, 96 U. S., 544, 547; Assurance Co. *v.* Norwood, 57 Kan., 610, 611, 613; 47 Pac., 529, 530, 532; Association *v.* Kryder, 5 Ind. App., 430, 435; 31 N. E., 851; Union National Bank *v.* German Ins. Co., 34 U. S. App., 397; 18 C. C. A., 203; 71 Fed., 473; Insurance Co. *v.* Teter, 136 Ind., 672, 673, 676, 679; 36 N. E., 283; Burt *v.* Bowles, 69 Ind., 1; Clodfelter *v.* Hulett, 72 Ind., 137; Hudson Canal Co. *v.* Pennsylvania Canal Co., 8 Wall., 276, 290; Insurance Co. *v.* Lyman, 15 Wall., 664; Pearson *v.* Carson, 69 Mo., 550; Insurance Co *v.* Neiberger, 74 Mo., 167; Lewis *v.* Ins. Co., 39 Conn., 100. As a prior or cotemporaneous oral agreement that the policy should be valid without the indorsement of the prior insurance could not avoid the written stipulation that it should be void, much less would the mere knowledge of both parties that the prior insurance existed without any agreement concerning it have that effect.

Moreover, this stipulation of the policy is a wise and salutary one

and it ought to be enforced. Its purpose is to prevent fraud and perjury by reducing to writing the entire agreement of the parties relative to the amount of indemnity upon the property insured and, if enforced, it admirably accomplishes that object. A refusal to enforce it or any evasion of it throws wide the door to fraud and perjury and practically deprives the insurance companies of their right to contract for a limitation of the amount of insurance on the property. For if that limitation may be avoided by testimony that some agent knew of the existence of other insurance which was not indorsed the temptation to find such testimony will often be great and there is no way in which the companies can protect themselves against its discovery. "A company which has seen fit to prescribe that the terms and conditions of its policy shall only be waived by its written or printed assent has prescribed only a reasonable rule to guard against the uncertainties of oral evidence and by this the insured has assented to be bound." Kyte *v.* Commercial Union Assurance Co., 144 Mass., 43, 46; Hale *v.* Mechanics' Ins. Co., 6 Gray, 169; Worcester Bank *v.* Hartford Ins. Co., 11 Cush., 265.

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2. The solicitor of the insurance company had no authority by oral agreement, by knowledge, by waiver, by estoppel, or in any other way to make a valid contract of insurance here without the indorsement upon the policy of the permission to carry the prior insurance and the insured knew that he had no such authority when it took its policy.

It is an established principle of the law of agency that a principal may limit the powers of his agent and that all parties who deal with the agent with knowledge of the limitation are bound by it. The insurance company had the right under this rule to limit the power of its solicitor to consent to other insurance to a written consent indorsed on the policy and it had the right to limit his power to deliver valid policies to those upon which all other existing insurance was indorsed in writing. The company made these limitations upon the powers of this solicitor by the express terms of its policy and the insured by accepting the policy was not only charged with knowledge of the existence of these limitations but it expressly agreed to their terms and their effect. It was beyond the power of the solicitor to deliver any valid policy upon which the concurrent insurance was not endorsed and the insured knew it and agreed that any policy he should so deliver should be void when it received it. This policy was of that character and was consequently void. "When a policy permits an agent to exercise a specified authority, but prescribes that the company shall not be bound unless the execution of the power shall be evidenced by a written indorsement on the policy, the condition of the essence of the authority and the consent or act of the agent not so endorsed is void." Quinlan *v.* Ins. Co., 133 N. Y., 356, 364; Walsh *v.* Hartford Fire Ins. Co., 5, 10; Marvin *v.* Universal Life Ins. Co., 85 N. Y., 278, 283; Moore *v.* H. F. Ins. Co., 141 N. Y., 219, 224; Kyte *v.* Commercial Union Assurance Co., 144 Mass., 43, 46; Ruth-

ven *v.* American Fire Ins. Co., 60 N. W. (Iowa), 663, 666; Insurance Co. *v.* Gibbons, 43 Kan., 15; 22 Pac., 1010; Cleaver *v.* Traders' Ins. Co., 39 N. W. (Mich.), 571; Weidert *v.* State Ins. Co., 24 Pac. (Ore.), 242; Smith *v.* Niagara Fire Ins. Co., 15 Atl. (Vt.), 353; Hankins *v.* Rockford Ins. Co., 35 N. W. (Wis.), 34; Gould *v.* Ins. Co., 51 N. W. (Mich.), 455; Clevenger *v.* Ins. Co., 3 N. W. (Dak.), 313; Enos *v.* Ins. Co., 8 Pac. (Cal.), 379; Gladding *v.* Ins. Co., 66 Cal., 6; Northwestern National Ins. Co. *v.* Mize, 34. S. W., 670. "When the policy of insurance, as in this case, contains an express limitation upon the power of the agent, such agent has no legal right to contract as agent of the company with the insured so as to change the conditions of the policy or to dispense with the performance of any essential requisite contained therein either by parol or writing and the holder of the policy is estopped by accepting the policy from setting up or relying upon powers of the agent in opposition to limitations and restrictions in the policy." Cleaver *v.* Traders' Ins. Co., 65 Mich., 527; 32 N. W., 660, 663.

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3. No fraud was perpetrated on the insured in this case, for there could have been no fraud without deceit, and the insured was not deceived. It knew that there was other insurance upon the property and it knew that the solicitor of the company had no power to deliver a valid policy unless the concurrent insurance was indorsed upon it and it agreed with the company that any policy which this solicitor should deliver should be void if the concurrent insurance was not indorsed. The insured was therefore neither deceived nor defrauded. It is the insurance company that was deceived and the insurance company that is defrauded, if it is compelled to pay this indemnity. Its agent acting without authority and the insured who knew he had no authority make a void contract and agree that it shall be void and then by the plea of a waiver that was never intended and an estoppel that did not exist seek to charge the company with the penalty of their conspiracy or carelessness.

There seems to me to be no ground for a waiver by, or an estoppel of the insurance company in this case for several reasons, (1) because the company expressly limited the power of its solicitor to make waivers or work estoppels of the character here invoked to those made in writing by indorsement upon the policy and it brought notice of this limitation home to the insured by an express stipulation in the policy which the insured accepted, (2) because an indispensable element of an estoppel is some act, statement or representation which tends to deceive the insured and thereby induces it to adopt a course of action or a state of inaction that it would not otherwise have taken, and this case contains no such element. The insured knew that there was other insurance. It knew that it was not indorsed upon the policy. It knew that the solicitor had no power to deliver a valid policy without such an indorsement and it knew that it agreed that without this indorsement its policy should be void, for all these things were written in the contract and the in-

sured was charged with knowledge of its contents, (3) because there can be no waiver without an intent to waive and no intent to waive can be deduced or inferred from the mere fact of knowledge in the face of an express written stipulation to the contrary made and delivered at the time, (4) because no estoppel or waiver based on acts or knowledge prior to or contemporaneous with the making of an express written agreement on the subject can prevail over the express terms of that contract which as conclusively merges and supersedes all prior and contemporaneous negotiations and understandings by estoppel and by waiver as by words. Insurance Co. *v.* Mowry, 96 U. S., 547, 548; United Firemen's Ins. Co. *v.* Thomas, 82 Fed., 409.

In my opinion the judgment below should be reversed and judgment should be entered for the insurance company.

Filed March 26, 1900.

72–47 (*Judgment.*)

And on the twenty-sixth day of March, A. D. 1900, in the record of the proceedings of said circuit court of appeals is a judgment in said cause in the words and figures following to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1899.

MONDAY, *March* 26, 1900.

THE NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, Plaintiff in Error,

vs.

THE GRAND VIEW BUILDING ASSOCIATION.

In error to the circuit court of the United States for the district of Nebraska.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Nebraska and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that the Grand View Building Association have and recover against the Northern Assurance Company of London, England, the sum of twenty dollars for its costs herein, and have execution therefor.

March 26, 1900.

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing fifty-four pages contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in the case of Northern Assurance Company of London, England, plaintiff in error, *vs.* Grand View Building Association, defendant in error, No. 1248, as full, true, and complete as the same remain on file and of record in my office.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at office, in the city of St. Louis, Missouri, this twenty-eighth day of April, A. D. 1900.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

72–48 United States Circuit Court of Appeals, Eighth Circuit.

No. 1248. Stipulation.

NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, Plaintiff in Error,
v.
GRAND VIEW BUILDING ASSOCIATION, Defendant in Error.

It is hereby stipulated and agreed by and between the parties hereto that the certified copy of the entire record in the above-entitled cause in the circuit court of appeals, which was filed by the above-named plaintiff in error in the Supreme Court of the United States with its petition to said Supreme Court for a writ of certiorari requiring said cause to be certified to said Supreme Court for its review and determination under section 6 of the act entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, shall be taken as a return to the writ of certiorari granted by the Supreme Court of the United States on Monday, May 21, 1900, in the said case of Northern Assurance Company, of London, England, plaintiff in error, *v.* Grand View Building Association, defendant in error, and the clerk of the said United States circuit court of appeals for the eighth circuit is

hereby requested to send up to the said Supreme Court of the United States a copy of this stipulation as his return to said writ of certiorari.

NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, *Plaintiff in Error,*
By CHARLES J. GREENE,
RALPH W. BRECKENRIDGE, *Its Attorneys.*
GRAND VIEW BUILDING ASSOCIATION,
By HALLECK F. ROSE, *Its Attorney.*

Endorsed: U. S. circuit court of appeals, eighth circuit. Northern Assurance Co. of London, England, pl'ff in error, *v.* Grand View Building Ass'n, def't in error. Stipulation as to clerk's return to writ of certiorari. Filed May 26, 1900. John D. Jordan, clerk.

A true copy.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

72–49 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Northern Assurance Company of London, England, is plaintiff in error and Grand View Building Association is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of Nebraska, and we being willing for certain reasons that the said cause and the record and proceedings therein sholud be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22d day of May, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No., 17,753. Supreme Court of the United States. No. 639, October term, 1899. Northern Assurance Company of London, England, *vs.* Grand View Building Association. Writ of certiorari and return. Filed May 26, 1900. John D. Jordan, clerk. Filed May 29, 1900. J. H. McK., cl'k.

Return to Writ.

UNITED STATES OF AMERICA, *Eighth Circuit, ss:*

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true, and complete copy of which is hereby attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of The Northern Assurance Company of London, England, plaintiff in error *vs.* The Grand View Building Association is a full, true, and complete transcript of all the pleadings, proceedings, and record entries in said cause.

Seal United States Circuit Court of Appeals Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States circuit court of appeals for the eighth circuit, at office, in St. Paul, Minnesota, this twenty-sixth day of May, A. D. 1900.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

73 *Stipulation of Facts.*

District Court, Lancaster County, Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
v.
NORTHERN ASSURANCE COMPANY OF LONDON, Defendant.

The parties hereto hereby stipulate and agree that the following facts are true and shall be so accepted by the court at the hearing without further proof than this stipulation.

I.

Plaintiff and defendant are both corporations, as alleged in the petition.

II.

The defendant executed and delivered to the plaintiff the policy of insurance mentioned in the petition on the 31st day of December, 1896, a copy of which is incorporated in the printed record Exhibit A. Plaintiff paid to defendant for said policy as premium the sum of $33.75 and on the day of its date received and thereafter retained possession of said policy.

III.

At the time of the issuance of said policy, and for some time prior thereto, there was subsisting insurance on the same identical property that is described in the defendant's policy in the sum of $1,500, underwritten by the Firemen's Fund Insurance Company, which insurance was in force at the time the insured property was
74 burned.

IV.

On the first day of June, 1898, all the property described in said policy was destroyed by fire, and said property at the date of issuance of said policy and at the time of said fire was of the value of more than $4,000.

V.

On or about the 26th day of July, 1898, the plaintiff mailed to the defendant at the city of Chicago, in conformity with the terms of said policy, proof of loss, making claim thereunder for the sum of $2,500, which was received at the office of the western department of the defendant company. After the receipt of said proof by registered mail, G. H. Lermit, the manager of the defendant company at Chicago, delivered to plaintiff a written communication, which is set forth at page 23 of the printed record, made a part of this stipulation, and on August 4, 1898, the defendant tendered to plaintiff the sum of $33.75, the amount of the premium paid on said policy, which plaintiff refused to receive, and which tender and payment the plaintiff refused to accept. No payment has ever been made by or on behalf of defendant to plaintiff of any sum whatever on account of the said loss under said policy. Plaintiff was the owner of said insured property at the date of the issuance of said policy by defendant and at the date same was destroyed by fire.

VI.

On the 30th day of August, 1898, the plaintiff instituted an action at law against the defendant in the district court of Lancaster county, Nebraska, and caused summons to be issued and served on defendant. therein. The said petition and all proceedings had thereon in
75 said cause in said district court of Lancaster county, and in the circuit court of the United States for the district of Nebraska, where the same was removed, and all of the pleadings in said courts and in the United States circuit court of appeals, including the writ of certiorari issued by the United States Supreme Court, and the return of the clerk of the said circuit court of appeals thereto, are as set forth in a printed transcript of the record of the United States Supreme Court, which is annexed to and made a part of this stipulation and marked "Exhibit A." That in addition to the proceedings shown in Exhibit A, the further proceedings had in said cause are the following: On January 6, 1902, the Supreme Court of the United States, having the record of said proceedings before it on a writ of

certiorari to the United States circuit court of appeals for the eig-th circuit, found that there was error in the judgment of said court, and in the judgment of the circuit court of the United States for the district of Nebraska, and entered judgment of reversal on said findings. The opinion of said court, delivered by Mr. Justice Shiras, is reported in 183 U. S. Reports at pages 308 to 365, both inclusive. And thereafter, in due course, a mandate was issued from said United States Supreme Court upon said judgment of reversal to the circuit court of the United States for the district of Nebraska, pursuant to which mandate, afterwards on May 12, 1902, on the motion of defendant, the final judgment was entered in said cause in the circuit court of the United States for the district of Nebraska; a certified copy of the journal entry of said final judgment is hereto attached, made a part hereof, and marked Exhibit B. The costs of said suit, which were taxed against the plaintiff in the sum of $400.88, remain unpaid.

76 VII.

Either party shall at the hearing have the right to adduce and offer competent testimony and proof as to any other fact in issue under the pleadings, material to the case, and not embraced within the above and foregoing stipulation of facts.

Dated this 23rd day of September, 1903.

HALLECK F. ROSE AND
WILMER B. COMSTOCK,
Attorneys for Grand View Building Association, Plaintiff.
GREENE, BRECKENRIDGE & KINSLER,
Attorneys for Northern Assurance Company of London, Defendant.

Endorsed: District court of Lancaster county, Nebraska. Grand View Building Association, pl'ff, *v.* Northern Assurance Company, def't. Stipulation of facts. Greene, Breckenridge & Kinsler, attorneys for defendant.

77 EXHIBIT B.

United States Circuit Court, District of Nebraska, May Term, Omaha, Nebraska, May 12th, 1903.

Court opened pursuant to adjournment.
Present: Hon. William H. Munger, judge.
The following among other proceedings were had and done, to-wit:

No. 285, "T."

GRAND VIEW BUILDING ASSOCIATION
vs.
NORTHERN ASSURANCE CO.

Now on this 12th day of May, 1902, this cause coming on to be further heard upon the motion of defendant for judgment in its favor on the special findings of the jury heretofore made herein, of which plaintiff has been given due notice, and the court being advised in the premises, and in pursuance to the mandate from the Supreme Court of the United States, it is now here

Ordered and adjudged that defendant have judgment against the plaintiff herein upon the special findings of the jury, no cause of action, and for its costs herein expended taxed at $—

78 UNITED STATES OF AMERICA, *District of Nebraska, ss:*

I, Geo. H. Thummel, clerk of the circuit court of the United States for the district of Nebraska, do hereby certify the above and foregoing to be a true and correct copy of the journal entry of the proceedings of said court, in the above entitled action as the same appears of record in my office. I further certify that the unpaid costs taxed in above action are $400.88.

Witness my hand and seal of said court at Omaha,
[SEAL.] in said district, this 22nd day of September, A. D. 1903.

GEO. H. THUMMEL, *Clerk.*

79 Endorsed: No. 285 Doc. T United States circuit court district of Nebraska. Grand View Building Assn. *v.* Northern Assurance Co. Copy of order of court.

80 Mr. BURT W. RICHARDS, being produced on behalf of the plaintiff, was duly sworn, and testified as follows:

Examination in chief by Mr. ROSE:

Q. Where do you live, and what is your business?
A. Lincoln, Nebraska. Insurance.
Q. What was your business, and with whom were you employed, on or prior to the 31st day of December, 1896?

A. I was then employed by the Farmers' & Merchants' Insurance Company, that is, as their city solicitor.

Q. And was the Farmers' & Merchants' Insurance Company a local company,—where does it have its headquarters and home office?

A. Lincoln, Nebraska.

Q. Did it write insurance for other companies in addition to its own business?

A. We had an agency of companies in connection with our home office.

Q. Did the Farmers' & Merchants', or its officers, represent other companies then?

A. They did.

Q. In what way?

A. As agents.

Q. How could you give insurance in other companies and do business yourselves?

A. We acted as outside company's agents.

Q. You often had large lines that you wouldn't write wholly yourselves?

81 A. Yes sir.

Q. That would be generally true with other business here in Lincoln?

A. Yes sir.

Q. Did you know H. J. Walsh during those years?

A. I did.

Q. Is he living now?

A. He is not.

Q. What relation did he have to the Grandview Building Association?

A. He was the president of the Grandview Building Association.

Q. In your office as solicitor, did you solicit generally for agency companies?

A. I solicited for all; I solicited for the Farmers' & Merchants' and they represented all the companies in their agency.

Q. In your employment, state whether you were employed to place large lines for different business men in the city?

A. Why, I have placed large lines of insurance, for different parties and firms, yes sir.

Q. In 1895 and 1896 who placed the insurance for Mr. H. J. Walsh?

BRECKENRIDGE: Defendant objects as immaterial and incompetent.

Overruled. Exception.

A. I placed Mr. Walsh's insurance from the time the Military Academy was built and made ready by the builders, I wrote every dollar's worth of insurance on it.

Q. And his other insurance also?

A. Yes sir, on the block at 11th and O.

82 Q. He had other property?

A. Quite a number.

Q. And large properties?
A. Yes sir.
Q. Did you know A. D. Borgelt in the month of December, 96?
A. Yes sir.
Q. What business was he engaged in?
A. Insurance.
Q. Where?
A. His office was in the Walsh & Putnam Block at 11th and O

Q. State whether you had any business transaction, prior to the uance of the policy in suit on household furniture on the Worthgton Academy, with Mr. Borgelt?

BRECKENRIDGE: Objects as incompetent, immaterial, irrelevant, t binding on the defendant, and hearsay.

Overruled. Exception.

A. Yes sir.
Q. State—Did the transactions you had have any reference to the stribution of the insurance on the property of the Worthington ilitary Academy?
A. It did.
Q. Now state what that was?

BRECKENRIDGE: Objects as incompetent, immaterial, irrelevant, earsay, and not binding on the defendant, and no competent evince that the witness was authorized to act for the plaintiff.

Overruled. Exception.

A. I don't know how long, but a short time before this I placed a policy for Mr. Walsh, with Mr. Borgelt, upon the tle water plant and heating plant and building and contents situed somewhat east and north of the Worthington Military Academy.
Q. Mr. Borgelt wrote the policy did he?
A. Yes sir.
Q. In what company?
A. The Northern I think.
Q. Do you know whether Mr. Borgelt, at that time, was representg the Northern?

BRECKENRIDGE: Objects as incompetent, and not the best evince.

Overruled. Exception.

A. Yes sir.
Q. Was he?

BRECKENRIDGE: Objects as incompetent, and not the best evidence.

Overruled. Exception.

A. He was.

Q. Were you acquainted with his office?
A. Yes sir.
Q. Now state, whether or not, when you gave the order for the issuance of this policy on the power plant, was that the same month, or within a month prior to this?
A. A short time, I should say within a month or six weeks. I am not sure, that was a long time ago.
Q. Do you remember the circumstances?
84 A. Yes sir.
Q. When you placed the order with him for the policy did he have to send it to any other agency, or did he write it himself here?
A. No, he wrote it himself here.
Q. Do you know whether he had supplies and signed policies in his office to be countersigned by the agent?
A. Yes sir.
Q. What became of the policy that you placed on the power plant of the Worthington Academy?
A. The policy was cancelled by the company for the reason they didn't want to carry the risk.
Q. How did you learn that fact?
A. Well, Mr. Walsh either called me up, or I was in his office, and Mr. Borgelt said that his company wouldn't carry the steam heating plant and would like to have some other insurance from that.

BRECKENRIDGE: Move to strike out the answer as incompetent, and hearsay.
Sustained. Exception.

Q. Was Mr. Borgelt present?
A. Not at that time, no sir.
Q. Did you receive any instructions from Mr. Walsh directly in regard to placing it?

BRECKENRIDGE: Objects as incompetent.
No ruling.

A. Yes sir.
85 Q. Did you afterwards communicate these instructions to Mr. Borgelt, the agent of the defendant here?
A. I did.
Q. State what you did in respect to that, and what you said to Mr. Borgelt, and where your conversation was?

BRECKENRIDGE: Objects as incompetent, hearsay and not binding on the defendant.
Overruled. Exception.

Q. It was the same time I was there, that I spoke of a few minutes ago, and it was decided that he would let Mr. Borgelt write a policy on the furniture.

Q. State what you said to Mr. Borgelt?
A. After I went into Mr. Borgelt's office, across the hall—(interrupted)
Q. It was in the same building?
A. Yes sir, on the same floor as Mr. Walsh's, and I said to him that Mr. Walsh would let him have a policy of $2500., I think it was, upon the furniture, to be written concurrent with our $1500. policy, and I would write the steam plant myself.
Q. Did you tell him what company your $1500 policy was in?
A. I told him it was to be written concurrent with our $1500 policy.
Q. Did you tell what company your $1500 policy was in?

BRECKENRIDGE: Objects to the form of the examination as leading and suggestive.

Sustained. Exception.

Q. Did you tell him what company your $1500 policy was in?
Q. Did you mention Mr. Walsh's name, or his authority
86 in connection with that, if so what did he say in respect to that?

BRECKENRIDGE: Objects as leading. We insist that *that* the question should be what was said.
Sustained. Exception.
Q. What, if anything, did you say with respect to having been requested by Mr. Walsh, to direct the writing of this policy?

BRECKENRIDGE: Objects as incompetent, leading, and not binding on the defendant.

Sustained. Exception.

Q. Have you stated all that you can now remember, Mr. Richards?
A. No sir.
Q. State any further facts you remember?
A. Well, I remember, this, that Mr. Borgelt was Mr. Walsh's tenant, and (interrupted).

BRECKENRIDGE: We object as incompetent.

Sustained. Exception.

Q. Was anything said—anything to Borgelt about Walsh having said that?
A. I said to Mr. Borgelt that Mr. Walsh was very anxious that he should have some of the insurance, inasmuch as he was a tenant, and had asked for it a good many times, and on that account, even if his company couldn't carry the steam plant or boiler house, he still wanted him to have a policy, and would let him write the $2500. concurrent with our $1500. already on there. That was all I remember that was said practically, he said he would do it, I suppose. I know he did.

87 BRECKENRIDGE: Moved to strike out this answer as incompetent, not binding upon the defendant, and particularly that part purporting to tell what Borgelt said, as not within the powers conferred upon Borgelt.

Overruled. Exception.

Q. State whether or not you ever ordered a policy that was not permitted, or which prohibited concurrent insurance?

BRECKENRIDGE: Objects as incompetent.

(Question withdrawn.)

Q. Have you stated the only conversation you had in respect to this insurance?

A. Yes sir.

Q. Now Mr. Richards, who was it—— Do you know anything about who wrote the policy for $1500. in the Fireman's Fund Insurance Company, admitted by the parties to have been written previously?

A. I do.

Q. Who wrote that?

A. The Farmers' & Merchants' Agency.

Q. Did you know it at that time you went to see Borgelt?

A. Yes, I solicited the business. Walsh gave it to me and I took it to the Farmers & Merchants and they wrote it in the Fireman's Fund as their agents.

Q. What do you mean by a recording agent; how was Borgelt, was he a recording agent?

88 BRECKENRIDGE: Objects as incompetent, immaterial, and irrelevant.

Overruled. Exception.

A. Why, a recording agent is authorized to bind the company, issue policies, sign policies and make contracts of insurance.

Q. And does he keep a record of his own policies?

A. He should. I do.

BRECKENRIDGE: Moved to strike out the answer as incompetent.

No ruling.

Q. What is the custom?

A. *A*—Well, they do, yes sir.

Q. What sort of supplies, according to the general custom are placed in the hands of a recording agent?

BRECKENRIDGE: Objects as immaterial and incompetent.

Sustained. Exception.

Q. This conversation, did that take place prior or subsequent to the issuance of the policy. Had the policy been issued?

A. No sir. Before.

Q. Which do you mean?

A. Before the issuance of the policy.

Cross examination by Mr. BRECKENRIDGE:

Q. How long have you been an insurance agent?
A. 16 or 17 years.
Q. Do you know, of your own knowledge, that Borgelt, at the time this policy was written, was a recording agent of the defendant company?
89 A. Yes sir.
Q. Did you see his commission?
A. No sir.
Q. Do you know whether he had a commission as agent?
A. No sir.
Q. Well it is customary for insurance companies to issue a commission to agents, to define their authority isn't it?
A. Yes sir.
Q. And what restriction is not put upon their authority by the commission, is usually found in the policy, isn't it?
A. Well, not necessarily.
Q. I asked you if it wasn't usually?
A. I think not.
Q. Where do you find the authority of the agent prescribed?
A. I don't think that the policy or the commission says that an agent can not——(Interrupted).
Q. Where do you find the definition of the powers of the agent?
A. In general practice.
Q. You knew nothing of the general practice as between the Northern Assurance Company and Borgelt did you?
A. Not a great deal, but some.
Q. Were you in Borgelt's office?
A. Yes sir.
Q. Did you have a desk there and intimately acquainted with his office?
A. No sir.
90 Q. Now when you say that a recording agent has authority to bind the company, do you wish to be understood as making that as an absolute flat statement?
A. Absolute.
Q. There are no qualifications?
A. It is subject to cancellation by the company upon receipt of the daily report sheet, made by the agent.
Q. The policy itself, contains no limitations on the powers of the agent?
A. It certainly contains a great many.
Q. Upon the powers of the agent?
A. Not upon the powers of the agent, but upon the company.
Q. Have you ever read the standard forms of policies?
A. Many of them.
Q. Did you ever read the policy that Borgelt issued, the one involved in this action?

A. No sir, it was a New York standard form.

Q. Don't you know that there was an express limitation in the standard New York form, unless consented to in a certain way?

A. Well, I don't know. I don't know what the New York form is on that point.

Q. You have read it?

A. Yes, but I can't tell you right now.

Q. Then when you say that a policy, such as this one, didn't limit the powers of the agent, do you mean you don't know?

A. No.

Q. Do you mean that you do know?

91 A. I mean that there are a great many limitations, in the policy, between the company and the insured. But they don't limit the agent from binding the company.

Q. I am asking you now, don't you know that there is an express limitation upon the authority of an agent with regard to risks already insured?

A. Under a New York standard form policy, I don't know.

Q. Then what you have said with reference to the power of the agent, has to be taken with the qualification that you don't know anything about it?

A. No sir, except under the New York standard form of policy.

Q. That is the form of policy we are dealing with isn't it?

A. I don't know.

Q. Do you know whether it was a New York standard form policy or not?

A. I do not.

Q. Then you don't know that Mr. Borgelt's only authority, with reference to the writing of insurance upon property already insured, was to expressly consent to the concurrent insurance on the policy written by him?

A. No sir.

Mr. ROSE: We will agree that the policies show that in this case.

Mr. BRECKENRIDGE, continuing examination:

Q. Do you remember that you were a witness in the trial of the former case between the parties to this suit?

A. Yes sir.

Q. That trial was held in the Federal court, in Omaha?

A. Yes sir.

92 Q. And you were questioned along substantially the same lines as here?

A. I think so, yes sir.

Q. Do you recollect that you were asked for the conversation between you and Borgelt, in Borgelt's office, at the time the insurance was written?

A. I expect I was.

Q. Do you remember on the trial of the case that you did not vol-

unteer the statement that Borgelt said that he would make this insurance concurrent?

A. That was 5 or 6 years ago; I don't remember

Q. You would be more likely to have given that conversation in full at that time than you would now, wouldn't you? If you were asked for the conversation, say in November or December 1898, you would be more likely to give it as it actually happened then than now, 5 years later?

A. Yes sir.

Redirect examination by Mr. ROSE:

Q. Your testimony was in substance the same at the other trial, in so far as you were questioned, wasn't it?

A. To the best of my recollection.

Q. About this policy that Borgelt issued, did he have to send in an application, and get them from headquarters in Chicago, or do it from his own office?

A. He wrote the policies and signed them in his own office.

Q. Did he have a partner at that time, a man by the name
93 of Beesley?

A. I think so, Beesley was partner of his about that time. I don't remember whether he was there then or not.

(Record identified as Defendant's Exhibit "A.")

BRECKENRIDGE: The defendant offers in evidence, as a part of the cross examination of Mr. Richards, Defendant's Exhibit "A", being a part of the examination, consisting of the following questions put to him upon the trial in the United States Court of the case of the Grandview Building Association *–vs–* Northern Assurance Company, had on December 19th, 1898.

ROSE: It is admitted that that is his testimony.

(Copy of Exhibit "A" is as follows:)

Q. Where was your conversation had with Mr. Borgelt?

A. In Mr. Borgelt's office.

Q. What was that conversation?

A. Mr. Walsh had asked me to take a certain policy covering a power plant with the Northern Assurance Co. to Mr. Borgelt and have him re-write it upon the furniture.

Q. What furniture?

A. The furniture in the Worthington Military Academy, and for the reason that the Northern Assurance Company refused to carry the power plant, and had made arrangements with me to write the insurance on the power plant. I took the policy and went across the hall from Mr. Walsh's office into Mr. Borgelt's office and laid it down on his desk there, and said, Mr. Borgelt, Mr.
94 Walsh has decided to let you place this policy on the furniture in the Worthington Military Academy, and I will write the power plant myself inasmuch as your company won't carry it, so you write this up on the furniture concurrent with our policy of $1500. on the furniture now.

Q. What was the $1500. policy to which you referred in that conversation, in what company was it?

A. In the Fireman's Fund.

Q. Had you been the solicitor that had obtained the order for that $1500. policy of Mr. Walsh?

A. Yes sir.

Q. And it was in a company, an association, for which you solicited at that time?

A. It was."

BRECKENRIDGE: The defendant agrees that the plaintiff may use, so far as it may be adjudged competent, the transcript from the stenographer's notes, of the testimony given by H. J. Walsh on December 19th, 1898, upon the trial of the former case between the parties to this suit.

The defendant does not by this agreement intend to consent to the competency of the testimony given on the former trial.

It is further agreed that the testimony he gave was under oath upon a trial then in progress in the suit mentioned in the
95 agreed statement of facts.

(Plaintiff's Exhibit "2" identified)

ROSE: The plaintiff offers to read from the transcript referred to, a portion of the testimony of Mr. Walsh, given at the trial referred to, touching the matter of his procuring the policy sued on.

No objections.

(Exhibit "2" read as follows)

"Q. State your name?

A. H. J. Walsh.

Q. Are you the president of the Grandview Building Association?

A. I am.

Q. Were you in the year 1896 and at the time the policy in suit was issued?

A. I was.

Q. In the matter of procuring the issue of this policy what person acted for and on behalf of the plaintiff?

A. I acted.

Q. With whom did you have your dealing in respect to the matter of the issue of this policy as a representative of the defendant insuance company?

A. Mr. Borgelt, the agent.

Q. Where was his place of business?

A. He occupied an office in our block, the Walsh and Putnam block

Q. What town?

96 A. Lincoln, Nebraska.

Q. Previous to the date of the policy in suit, did you have a conversation with Mr. Borgelt, the same Borgelt you have mentioned as having issued this policy?

A. I had.

Q. State where and when, as near as you can, and give the conversation?
A. They took place in my office and in his office.
Q. Proceed and tell what the conversation was?

BRECKENRIDGE (At trial): Objects as incompetent an- irrelevant. Not tending to bind the defendant company because under the terms of the policy, attached to the petition in this case, the defendant's agent, Borgelt, was not authorized to make any oral contract with reference to concurrent insurance.
Overruled. Exception.

A. The Northern had a previous policy on the water works and power house; their company objected to their carrying that risk and asked him to cancel it.
Q. That is what he told you?
A. Yes, that is what he told me; and I still wishing to favor him, his being a tenant, I told him that there was but $1500. on the furniture and it would carry four.

97 BRECKENRIDGE (At trial): Objects as incompetent and irrelevant. Not tending to bind the defendant company because under the terms of the policy, attached to the petition in this case, the defendant's agent, Borgelt, was not authorized to make any oral contract with reference to concurrent insurance. And the defendant moves to strike out the answer for the reason that it is incompetent.
Overruled. Exception.

Q. Four what?
A. A larger risk; there being at this time about, as I understood from my book keeper, furniture to about $4800 of value in the building, and Mr. Borgelt thought that he could write the $2500. additional insurance on the furniture, and said he would do so.

BRECKENRIDGE: Moved to strike out the answer as incompetent, irrelevant, not tending to bind the defendant company, because, under the terms of the policy, attached to the petition in this case, the defendant's agent, Borgelt, was not authorized to make any oral contract with reference to concurrent insurance.
Overruled. Exception.

Q. Did you procure any further or additional insurance on this identical subject of insurance covered in the policy in suit
98 after the date that this policy was issued?
A. No sir.
Q. Whatever insurance was on there was specified at the time this policy was issued?

BRECKENRIDGE: Objects as incompetent, irrelevant, not tending to bind the defendant company because, under he terms of the policy, attached to the petition in this case, the defendant's agent,

Borgelt, was not authoized to make any oral contract with reference to concurrent insurance.

Overruled. Exception.

A. Yes sir.

Q. And was there any other or different insurance than that to which you have already referred as having been mentioned to Mr. Borgelt?

A. No. sir.

Q. State whether or not you requested anyone else to confer with Mr. Borgelt about the insurance before it was written in your behalf, or in behalf of the plaintiff, the fact, yes or no?

A. Yes sir.

Q. Who was that person?

A. Mr. Richards.

Q. What is his full name?

A. Bert, they call him.

Q. What was his business at that time?

99 A. He was the agent for the Farmers' & Merchants; he had the other policy.

Q. Now at any of the conversations you had with Mr Borgelt, was Mr. Richards present?

A. I think he was.

Q. At what place, if you remember, was Mr. Richards present when you had a conversation with Mr. Borgelt about the taking out of this insurance?

A. I think in my office.

Q. What, if any, conversation was had between you and Mr. Borgelt or Mr. Richards in Mr. Richards' presence concerning the amount of insurance then being carried on the furniture in the Academy?

BRECKENRIDGE (At trial): Objects as incompetent, irrelevant, and not tending to bind the defendant company because, under the terms of the policy, attached to the petition in this case, the defendant's agent, Borgelt, was not authorized to make any oral contract with reference to concurrent insurance.

Overruled. Exception.

A. Why, Mr. Richards and Mr. Borgelt conferred to have this policy concurrent?

Q. Who delivered you this policy that is in suit?

A. Mr. Borgelt.

Q. At what place was it delivered to you?

100 A. In my office.

Q. To whom was the premium paid?

A. Mr. Borgelt.

Q. When the policy was delivered to your office what did you do with it?

A. I put it in my safe.

Q. In the taking of the policy in payment of your premium what or whom did you rely upon as to the form of the policy in which the risk was underwritten?

A. I relied—I never looked at the policy; I suppose it was like all my policies; I presume the endorsement was on there, and I did not know for two or three weeks after the fire but that the policy was all right.

BRECKENRIDGE (At trial): Moved to strike the answer as incompetent.

Overruled. Exception.

Record identified as Plaintiff's Exhibit "3.")

ROSE: Plaintiff offers to read in evidence a portion of the cross-examination of Mr. H. J. Walsh, before referred to.

No objection.

(Copy Exhibit "3" being as follows:)

ROSE: On page "37" showing that the witness was cross examined by Mr. Breckenridge, as follows:

101 "Cross-examination by Mr. BRECKENRIDGE:"

ROSE: Also on page "41" a portion of said cross examination as follows:

"Q. Mr. Walsh, the talk you say you had with Mr. Borgelt was prior to the time when the policy was given to you, was not it?

A. No sir.

Q. Before the time this policy was given to you?

A. O yes, and about the time.

Q. But the policy was the last thing in the transaction, the delivery of the policy?

A. Yes sir."

Mr. H. F. ROSE, being produced on behalf of the plaintiff, was duly sworn, and testified as follows:

Examination in chief by Mr. COMSTOCK:

Q. What is your name and where do you reside?

A. My name is H. F. Rose, and I reside in Lincoln.

Q. What is your occupation?

A. Attorney-at-law.

Q. And you are the attorney in this action?

A. Yes sir.

Q. Were you the attorney for the plaintiff in the action at law of the Grandview Building Association *vs.* The Northern Assurance Co.?

A. Yes sir.

Q. Where was that action begun?

A. In the district court of Lancaster county was where it was instituted.

102 Q. Was it finally determined in that court?

A. No, it was finally determined in the courts of the United States, to which it was removed on the ground of diverse citizenship.

Q. Now you may state to the court the reason of the prosecution of that action at law?

BRECKENRIDGE: Objects as incompetent, immaterial, irrelevant, and not the best evidence.

Overruled. Exception.

A. The matter of the selection of remedy was left entirely to me, by the president of the association, as his counsel. Before commencing the action, my attention was directed to the rulings in this court in the two Covey cases, in the 41st Nebraska, and also in the case of the Home Fire Insurance Company vs. Hammong, in the 44th Nebraska, and under these precedents I conceived, notwithstanding the fact that the policy in terms restricted other insurance, that we could plead the fact of the agents' knowledge, and his omission to make the contract as the assured had supposed it to be, by way of an equitable estoppel, and in that action we could supplement the written instrument by these matters which were pleaded in addition to it, and there, in that form, obtain the same relief which we are now seeking by reformation in this court.

BRECKENRIDGE: Moved to strike out the entire answer of the witness as incompetent, and irrelevant.

Overruled. Exception.

103 Now after the removal of that action, from this court to the Federal Court, was the matter of the selection of remedies canvassed again?

A. Yes, we had it under advisement, the question of dismissing the cause in that form, and I canvassed the authorities which I thought would be authority on that course, I found the case of the Fireman's Fund Insurance Co. vs. Norwood, reported in the 16th volume of the Circuit Court of Appeals, and decided by the Circuit Court of the Eighth Judicial Circuit. I remember distinctly that there applied the doctrine and I gave the volume to Mr. Walsh, which I had borrowed from the State Library, and he took it and read it over night; in that opinion was also cited the case of the Insurance Company vs. Wilkinson in the 13th Wallace, where the opinion was written by Mr. Justice Millar, and from these authorities I concluded our only remedy, in the forum to which the cause was removed, on the facts, which were as stated in the present petition, was in an action at law, and in that forum we could have relief by the doctrine of equitable estoppel. I also supposed, if that was true, and my interpretation of these decisions was correct, and they were authoritative, that an equity court would not entertain a proceeding to reform the policy, because, under these decisions, an omission to endorse on the policy, would be material to an action at law if the

previous knowledge of the Insurance Company was pleaded, and thereupon, I filed the reply and elected upon that theory, to proceed in the Federal Court to judgment.

104 BRECKENRIDGE: Moved to strike out the answer as irrelevant, contending and insisting that it is wholly incompetent, and is the mental process of Mr. Rose.

Overruled. Exception.

Q. Have you copies of the briefs presented by the defendant in the action at law in the Federal Court?

A. Yes, I have here one of the original briefs filed by the attorneys for the Northern Assurrance Company in the Circuit Court of Appeals; also one of the original briefs filed by the same company, in the Supreme Court of the United States in the action at law, and both bearing the filing marks of the respective courts. I have also copies of the supplemental brief and argument filed by the attorneys for the Northern Assurance Co. in the Circuit Court of Appeals, which was handed me by, or sent to me, through the courtesy of Mr. Breckenridge, one of the attorneys.

(Certain paragraphs of briefs identified as Plaintiff's Exhibits "4," "5," "6," "7," and "8.")

ROSE: I offer in evidence Exhibit "4," being the middle paragraph of page "7" of the Brief of the Northern Assurance Company filed in the action at law in the United States Circuit Court of Appeals of the Eighth Judicial Circuit.

BRECKENRIDGE: Objects as incompetent, and irrelevant as testimony for the plaintiff.

Overruled. Exception.

105 (Copy of Exhibit "4" being as follows:)

"This proceeding did not even take the form of an appeal to the conscience of the court to reform the contract upon which the suit is brought, but in the severe language of Judge Sanborn in the case cited, "It is a bald attempt to supersede written agreements with the parol negotiations which preceded and induced them."

ROSE: I offer Exhibit "5," being two paragraphs of the same brief on pages "47" and "48," filed by the Northern Assurance Company in the circuit court of appeals in the eighth judicial circuit.

No objection.

(Copy Exhibit "5" being as follows:)

"We have endeavored to make a full presentation of the law covering this case, and without further extension of our argument, submit that the judgment must be reversed for four reasons:"

"2nd. The action does not seek to reform the policy to make it express the agreement of the parties as claimed by the plaintiff, and as stated by Judge Jenkins in Insurance Co. *v.* Thomas, 82 Fed., 406, 409, *supra.*

The assured brought suit at law upon the policy, and stands upon

the very terms of his contract. He asks no reformation of it, and cannot, in this action at law, avoid its express stipulation."

106 ROSE: I offer in evidence Exhibit "6," from the supplemental brief filed for the Northern Assurance Company in the action at law, in the United States court of appeals for the eighth judicial circuit.

(Copy of Exhibit "6" is as follows:)

"It is further conceded that the enforcement of the condition of the policy sued on, relied upon as a bar to the recovery, makes a hard case for the plaintiff; but, "The plaintiff had the right to enter into such contract if he deemed it proper, and though it may operate severely upon him, yet it is not competent for the court to relieve him from the legitimate consequences of his own voluntary contract."

Gardner *v.* Ins. Co., 38 Me., 439, 442, citing Carpenter *v.* Providence Washington Ins. Co., 16 Pet., 495.

It must be borne in mind that this is not a suit in equity to reform this contract; upon the contrary it is a suit at law in which the petition declares upon the policy as made.

If from mistake or fraud an agreement is so defective that instead of conveying the meaning of the parties, it expresses a different or opposite intent, if relief can be given at all, it must be sought exclusively in a court of equity. A court of law must act under the agreement as it is. It can not strike out or change any part or anything so as to contradict or vary the agreement contained in the written instrument."

107 Barrett *v.* Ins. Co., 7 Cush., 175, citing Carpenter *v.* Ins. Co., *supra.*

ROSE: I offer in evidence Exhibit "7" being an excerpt from page "6" of the brief of the Northern Assurance Co. filed in the Supreme Court of the United States.

No objection.

(Copy of Exhibit "7" being as follows:)

"This proceeding did not even take the form of an appeal to the conscience of the court to reform the contract upon which the suit is brought, but in the severe language of Judge Sanborn in the case cited: "It is a bald attempt to supersede written agreements with the parol negotiations which preceded and induced them."

ROSE: I also offer Exhibit "8" from page "22" from the same brief last mentioned.

No objection.

(Copy Exhibit "8" being as follows:)

It is further to be borne in mind that this is not a suit in equity to reform the contract, but an action at law in which the policy as made, delivered and accepted, is declared upon as the basis of the suit.

No agreement is pleaded that consent for concurrent insurance was to be indorsed in writing upon the policy; not even an agreement

that concurrent insurance was, in fact, to be allowed; but
108–111 the plaintiff's right to recover is placed squarely upon the allegation (3), that the company's agent "issued said policy,—with knowledge beforehand of said concurrent insurance and with the intent knowingly to waive the condition of said policy that 'it shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, on the property covered thereby.'" And that by the conduct of its agent "the defendant has waived the said condition and is estopped to claim benefit thereof and is bound by its said policy, notwithstanding said condition." Nor does the reply (15, 16), plead an agreement to endorse in writing upon the policy the company's consent to concurrent insurance, nor does it allege that the defendant's agent consented to concurrent insurance, is pleaded as a waiver and estoppel of the condition against concurrent insurance not consented to in writing indorsed on the policy sued upon.

But a plaintiff in a law action is bound by his pleading, and in a suit upon a contract upon which the petition declares, is bound by the provisions and conditions of the contract."

Cross-examination by Mr. BRECKENRIDGE:

BRECKENRIDGE: The defendant offers in evidence defendant's Exhibits "B," "C," and "D," being the whole of these same briefs, as part of the cross-examination of counself for plaintiff.

No objection.

* * * * * * *

112 Q. At the time you brought this suit did you ever hear of the case of the Provident Insurance Company –*vs.*– Carpenter reported in the 16th Peters, 495?

A. Yes, I think I had cited that in some of the briefs I prepared, but not upon this point.

Q. But you knew of that case?

A. I knew of it in a general way; but in the preparation I can't say that I recall it. I know I have cited that case on other points, and had before this.

Q. Before this litigation began?

A. I think that is true.

Q. And that case was removed to the Federal court after considering the case of the Fireman's Fund Insurance Company –*vs.*– Norwood; and the dissenting opinion of Judge Sanborn escaped your attention?

A. No sir, I saw it.

Q. Did you make a search through the digest, or otherwise, to see whether the case of the Provident Company –*vs* – Carpenter had been in terms overruled by the Supreme Court of the United States?

A. Well, I can't say that I did. I examined the Wilkinson case.

Q. Did you, or not, make a search to see whether the Carpenter case had been overruled in terms by the Supreme Court of the United States?

A. Well sir, I wouldn't like to say definitely.

113 Q. You have no recollection of making any such search, have you?

A. I have no specific recollection of that.

Q. One way or the other?

A. I—well, I know my attention was drawn to that case, how far I searched afterwards; I searched some, and found other cases, but I don't think I found that it had been in terms overruled. I am sure of that; I might have made a search, I wouldn't say but what I did.

Q. The question of a choice of remedies was given consideration by you and discussed between you and Mr. Walsh, representing the plaintiff, before you brought the suit in the district court of Lancaster county, is that right?

A. Well, that is right in a qualified sense; the question of what was our remedy was discussed.

Q. What did you mean that the question of remedies was left to you, about which you testified upon your direct examination?

A. I mean that, that matter was confided entirely to me, as that matter usually is, to the lawyer.

Q. As to whether you should sue upon the policy or sue in an action to reform, was that discussed between you and Mr. Walsh?

A. Not until after it was removed to the Federal court.

Q. It was then?

A. Yes sir.

114 Q. And after the answer was filed by the defendant company in that case, there was some consideration given by you to the question whether you should dismiss that suit, or whether you should stand upon the suit you had begun and proceed to trial and judgment upon that?

A. Yes sir.

Q. You considered whether you should not dismiss that suit and begin an action to reform the policy?

A. Yes sir.

Q. That was discussed between you and the plaintiff?

A. It was.

Q. If I understand you correctly you got for him the opinion of the circuit court of appeals in the Norwood case and he took it home and read it?

A. Yes sir.

Q. Mr. Rose, in considering the question of the choice of remedies, and before you concluded to stand pat on the action already commenced, did you not, in your investigations of the law, run across a decision of the circuit court of appeals of the seventh judicial circuit in the Thomas case found in the 82nd Federal 402?

A. No, my attention never was directed to that case until after the verdict in the action at law was rendered, and the matter was directed to my attention by a communication, or by yourself rather, and I received a copy of the same, which you sent to me.

115 Q. Did you read the decision of the Supreme Court in Insurance Company *–vs.–* Lyman, 15th Wallace?

A. No, I don't remember about the Lyman case, I was thinking of the Wilkinson case.

Q. You don't remember about the Lyman case?

A. I remember now, but I don't recollect considering that upon this proposition.

Q. Did it ever occur to you that in the dissent and disagreement among the judges of the eighth circuit, upon the proposition already indicated by the dissenting opinion of Justice Sanborn in the Norwood case, and the fact that there was a disagreement between the seventh and eighth circuits that the Supreme Court of the United States might take that case by certiorari and dispose of it there?

A. I confess that I figured that the circuit court of appeals would be the court of last resort; I had not discovered at that time any diversity; I supposed the Wilkinson case disposed of the opinion of Judge Caldwell in the Norwood case.

Q. Then, as a matter of fact, you will confess that you made a mistake in the law, will you not, as ultimately determined by the Supreme Court upon the facts?

A. Yes, in that aspect; in our remedy, our right to have relief in a court of law, I made a mistake; I didn't anticipate the ultimate holding of the Supreme Court on that question, I guessed wrong.

Q. Upon the law?

116 A. I guessed wrong upon whether we could maintain this action and get relief in a law action notwithstanding that we pleaded the facts. In a law action, on the law of estoppel, I guessed wrong.

Q. You know something of the burden, trouble and expense incident to the litigation of that case, to the defendant in that other suit?

ROSE: Objects as not proper cross examination, and not a subject upon which the witness has spoken in his examination in chief.

Overruled. Exception.

A. I really don't know a thing about it.

Q. You know that day, when the case was tried at Omaha in the Circuit Court of the United States?

A. Yes sir.

Q. You know it was taken from there to the court of appeals, and argued at St. Louis?

A. Yes sir, I was there.

Q. You know it was removed to the Supreme Court of the United States by a writ of certiorari?

A. Yes sir.

Q. You know, don't you, that counsel on both sides went down to the Supreme Court at Washington, when it was on the calendar but not reached?

A. Yes sir.

117 Q. And you know that counsel on both sides went to Washington the second time, the time that case was argued?

A. Yes sir.

Q. And you say that you seriously considered dismissing the suit you had brought after the removal to the Federal Court?

A. Yes sir, that was discussed before we examined the Federal authorities.

Redirect examination by Mr. COMSTOCK:

Q. Your attention has been called to the Carpenter case?

A. Yes sir.

Q. Now was that case decided before or after the Wilkinson case; which was the later case?

A. It was decidedly a good many years before the Wilkinson case.

Q. You examined the Wilkinson case?

A. Yes sir, after I got into the question I examined both the Carpenter case and the Wilkinson case, after the case had been removed to the Federal court, I examined both of these cases before I replied in the Federal court.

Q. Now have you any—do you now recall any other fact that you wish to state in reference to that?

A. Why nothing, except that after examining these authorities,
118 the Norwood case and the Wilkinson case, which was cited by Judge Caldwell, we abandoned our suggestion of dismissal because we thought an action at law was our only remedy.

BRECKENRIDGE: Moved to strike out the answer as incompetent, and not re-direct.

Sustained. Exception.

Witness excused.

The hour of adjournment having arrived a recess was taken until
119 the 22nd day of October, 1903.

Thursday, October 22nd, 1903, pursuant to adjournment of October 2nd, 1903, parties present and trial proceeded.

BRECKENRIDGE: The defendant moves to strike from the record the evidence of Mr. Walsh taken on the other trial in the Federal court as incompetent and not tending to prove any issue in this case. And for the further reason that such testimony on the other trial, is not available to the plaintiff in this case.

Overruled. Exception.

Plaintiff rests.

Mr. A. D. BORGELT, being produced on behalf of the defendant, was duly sworn and testified as follows:

Examination in chief by Mr. BRECKENRIDGE:

Q. State your name to the court.

A. A. D. Borgelt.

Q. Where do you live?

A. 811 G. Street, Lincoln, Nebraska.

Q. What is your business?

A. County Commissioner.
Q. You may state if you sustained any relation to the Northern Assurance Company in December 1896?
120 A. Why, I did, yes sir.
Q. Were you the agent of the Company at Lincoln?
A. Yes sir, and I am at the present time.
Q. Do you remember of writing a policy of insurance for the Grandview Building Association in the Northern Assurance Company in December 1896?
A. Yes sir.
Q. With whom did you have a talk about that policy?
A. Mr. Walsh.
Q. State whether or not Mr. Walsh said anything to you about there being any other insurance covered by that policy?
A. No sir, not a word.
Q. You may state whether you knew, at the time you delivered that policy, that there was any other insurance on the property covered by that policy?
A. No sir, I did not.
Q. When did you first learn that there was other insurance on the property covered by that policy?
A. After the fire.

Cross-examination by Mr. ROSE:

Q. You say you are the agent that wrote this particular policy?
A. Yes sir.
Q. What did you do with it after you wrote it?
A. I brought it to Mr. Walsh's office and told him to look it over and see if it wasn't all right, if it wasn't I would make it all right.
121 Q. You delivered it to Mr. Walsh?
A. Yes sir.
Q. The policy you issued was already in your hands, placed there by the Company, the blank was already in your hands was it?
A. Always is.
Q. In your agency you kept the blank policies on hand that were signed by Mr. Lesmit, the Western manager at Chicago?
A. Yes sir.
Q. With either actual or lithographed signature?
A. Yes sir.
Q. It required only your signature before it became binding?
A. Yes sir.
Q. When you signed it that was all the signature it required before it was signed and delivered?
A. Yes sir.
Q. And you collected the premiums also?

BRECKENRIDGE: Objects as incompetent, immaterial and not cross-examination.
Sustained. Exception.

Q. This occurred in 1896, did it?
A. As near as I can remember, yes sir.
Q. Mr. Borgelt, your memory of affairs generally, that took place at that time and the details of them, is that very accurate?

122 BRECKENRIDGE: Objects as immaterial, incompetent and not cross-examination.
Overruled. Exception.

A. I don't see why it should not be.
Q. You had a wound in the forehead once, didn't you?

BRECKENRIDGE: Objects as immaterial, incompetent and not cross-examination.
Overruled. Exception.

A. I don't think that had anything to do with the case.
Q. You did, didn't you?
COURT: You may answer.
A. Yes sir.
Q. That was a bullet wound received from a man named Cameron, a lunatic?
A. Yes sir.
Q. You were sick a long time after that weren't you?
A. Seven weeks.
Q. A portion of the bullet that penetrated your skull has never been removed has it?

BRECKENRIDGE: Objects as immaterial, incompetent and not cross-examination.
Overruled. Exception.

A. I don't think there is anything in it now.

123 Q. Are you not conscious that the results of that wound seriously impaired your memory for a time?
A. I don't think so.
Q. Do you know what year that took place in?
A. Yes sir.
Q. What year was it?
A. The 8th of March, 1892.
Q. Do you know whether you were sworn and testified as a witness on the trial of the case of the Grandview Building Association vs. The Northern Assurance Company that was formerly tried in the circuit court of the United States in and for the district of Nebraska at the court house at Omaha?
A. Yes sir.
Q. Do you remember about the date of that trial?
A. Let me see, I don't know as I do just exactly, it was in the fall of the year, I think.
Q. It was in December of the year 1898 wasn't it?
A. I don't remember that.
Q. Do you remember being cross examined by myself at that trial?

A. Yes sir.

Q. Did I ask you this question: You would not be positive and absolutely certain that Mr. Walsh did not mention to you that he only had $1500 on the furniture and that it would carry more? Do you remember such a question being asked?

124 BRECKENRIDGE: Objects as incompetent and not cross examination.

Overruled. Exception.

A. I know positively that Mr. Walsh——(Interrupted)

Q. I am asking you if on the other trial I asked you such a question?

A. I think you did.

Q. And did you not answer to that: I do not remember him saying anything about it?

BRECKENRIDGE: Objects as incompetent and not cross examination.

Overruled. Exception.

A. I think I did.

Q. Didn't I, while you were testifying under oath ask you: Yet he might have mentioned that to you? And didn't you answer: He may?

BRECKENRIDGE: Objects as incompetent and not proper cross examination.

Overruled. Exception.

A. Yes sir.

Q. Do you think your memory is better now than it was then?

A. Yes sir.

Q. What has refreshed you memory since that occasion?

A. Since having read it over a moment ago.

Q. Having read it over, it makes your memory fresher than it was at the previous time?

A. It comes to me.

125 Q. It comes to you in a different way than it did on the other trial, don't it?

A. Well, I wouldn't think so.

Q. And yet, on the other trial, you said he might have mentioned that there was other insurance?

BRECKENRIDGE: Objects as not cross examination.

Sustained. Exception.

Q. Now you know Mr. Burt Richards?

A. I do.

Q. You had previously written a policy for the Grandview Building Association upon this power house out there hadn't you?

A. I think so; I know it, yes sir.

Q. Just a month or so prior?

A. Yes sir.
Q. Or a month less maybe?
A. I guess it was less than two weeks prior to that; no it wasn't prior to that either.
Q. Now who gave you the order for the previous policy on the power house?
A. Well sir, that is something I can't say.
Q. Refreshing your recollection wasn't it Burt Richards?

BRECKENRIDGE: Objects as immaterial, irrelevant and not cross examination.
Overruled. Exception.

126 A. I don't think so.
Q. You don't think Mr. Richards gave you the first policy?
A. That is one—I know he didn't give it to me, you mean on the power house?
Q. You say you know he didn't give it to you?
A. Well sir, I can't say.
Q. Now you were examined upon that question at the former trial?
A. Yes sir.
Q. Didn't I ask you upon the former trial as follows: "You think Mr. Richards ordered the power house policy instead of this one? And didn't you answer: Yes sir?
A. Well sir, that has slipped my memory.
Q. You did have a talk with Richards about one of the policies didn't you?
A. Yes sir, I must have had.
Q. At this time you officed in Mr. Walsh's building didn't you?
A. Yes sir.
Q. Do you know who—Mr. Walsh controlled a good many properties, didn't he?

BRECKENRIDGE: Objects as not proper cross examination and immaterial.
Sustained. Exception.

Q. Do you know who looked after Mr. Walsh's insurance?

BRECKENRIDGE: Objects as irrelevant and not cross examination.
Overruled. Exception.

127 A. I think the Farmers & Merchants.
Q. Who was the city solicitor for the Farmers & Merchants?
A. Well sir, you have got me there for they have so many.
Q. At that time wasn't it Burt Richards?
A. I think so.
Q. Did you know him at that time?
A. I certainly did.

Q. Mr. Borgelt, you didn't intentionally collect a premium after putting out a policy that was void at the time, did you?

BRECKENRIDGE: Objects as incompetent and not proper cross examination.

Sustained. Exception.

Witness excused.

(Deposition of G. H. Lermit identified as Defendant's Exhibit "E")

BRECKENRIDGE: The defendant offers in evidence the deposition of G. H. Lermit.

No objection.

128 Copy Exhibit "E" as follows:

Notice to Take Depositions.

District Court, Lancaster County, Nebraska.

GRANDVIEW BUILDING ASSOCIATION, Plaintiff,

v.

NORTHERN ASSURANCE COMPANY OF LONDON, Defendant.

To the above named plaintiff or Halleck F. Rose, its attorney:

You will take notice that on Friday the 11th day of September, 1903, the said defendant will take the deposition of G. H. Lermit to be used as evidence on the trial of the above entitled cause, before competent authority at the offices of the Northern Assurance Company of London, in the Monadnock block, city of Chicago, Illinois, at the hour of 11 o'clock a. m., with authority to adjourn from day to day until all such depositions shall have been taken.

GREENE, BRECKENRIDGE & KINSLER,
Attorneys for Defendant.

Received copy of the above notice this 5th day of September, 1903.

HALLECK F. ROSE,
Attorney for Plaintiff.

District Court, Lancaster County, Nebraska.

GRANDVIEW BUILDING ASSOCIATION, Plaintiff,
vs.
NORTHERN ASSURANCE COMPANY OF LONDON, Defendant.

129 CHICAGO, COOK COUNTY, ILLINOIS,

September 11, 1903.

Deposition of Gerald Henry Lermit, taken before me, Elizabeth A. Gardiner, notary public, duly commission- and qualified within and for the county of Cook, and State of Illinois, pursuant to the annexed notice, at the offices of the Northern Assurance Company, on the 6th floor of the Monadnock block, city of Chicago, said county and State, beginning at 11 o'clock a. m.

Present: In behalf of plaintiff, no appearance. In behalf of defendant, R. W. Breckenridge of the firm of Greene, Breckenridge & Kinsler, Omaha, Nebraska.

GERALD HENRY LERMIT, of lawful age, being first duly examined, cautioned and solemnly sworn, as hereinafter certified, testifies as follows in answer to interrogations by Mr. Breckenridge:

Q. —. Please state your name, residence and occupation?

A. Name; Gerald Henry Lermit; manager at Chicago, of the western department of the Northern Assurance Company of London.

Q. 2. How long have you been manager of the western department of the Northern Assurance Company, at Chicago?

A. Since April 1894.

130 Q. 3. Do you recollect correspondence between this company and the Grandview Building Association regarding a claim for indemnity, under policy No. 310,024, of the Lincoln, Nebraska, agency of your company, upon the property of the Grandview Building Association?

A. I do.

Q. 4. How did that correspondence originate?

A. On question of loss by fire which occurred on property supposedly insured by this company.

Q. 5. On what date did you receive the communication from the Grand View Building Association?

A. Under date of July 28th, 1898, we received communication dated July 26th, 1898, from the Grand View Building Association, by H. J. Walsh, president.

Q. 6. Was that letter answered?

A. It was, under date of August 2nd, 1898. This letter was addressed to the Grand View Building Association, H. J. Walsh, president, Lincoln, Nebraska, and was sent by registered mail.

Q. 7. How was that letter signed?
A. It was signed G. H. Lermit, manager, by A. E. Clough, attorney.
Q. 8. By whose authority was that letter sent?
A. By my authority.
Q. 9. Have you a copy of that letter which was written by you and sent to the Grand View Building Association, under date of August 2nd, 1898?
A. I have.
131 Q. 10. Will you produce that copy?
A. Here it is.

(The witness produces a copy of the letter, which is marked "Defendant's Exhibit 1.")

Q. 11. State what that copy is.
A. It is a carbon copy of the original letter.
Q. 12. Do you know what the date of that policy was?
A. It was dated December 31st, 1896.
Q. 13. State whether or not you received the Daily Report of the issue of that policy?
A. We did, in regular course.
Q. 14. You may state whether or not, between the date of the receipt of the Daily Report showing the issuance of the policy, and the demand for indemnity because of fire to the property covered by the policy, any correspondence passed between your company and the Grandview Building Association or its officers, regarding the terms of the policy?

Rose (at trial): Objects as incompetent, irrelevant and because knowledge of the agent at Lincoln, Nebraska would be imputed to the Company, and would be immaterial whether or not in fact he transmitted his information.
Overruled. Exception.

A. None whatever.
132 Q. 15. Do you recollect the fact that suit was begun shortly after upon this policy?
A. I do?
Q. 16. Do you remember about the time suit was brought?
A. We were informed of it sometime shortly after August 30th, 1898.
Q. 17. You may state whether or not at any time prior to the commencement of the suit of which you were advised shortly after August 30th, 1898, the Grandview Building Association made any demand of you that the policy be reformed or changed, so as to recite the consent to other insurance upon the property covered thereby?

Rose (at trial): Objects as immaterial.
Overruled. Exception.

A. No demand of any such kind was made upon us.

Q. 18. When did you, or the Northern Assurance Company, first learn that there was other insurance upon the property covered by your policy—on the property of the Grandview Building Association?

ROSE (at trial): Objects as incompetent, immaterial, irrelevant, because the knowledge of the agent would be imputed to the company.

Overruled. Exception.

A. Shortly after the fire, which occurred on June first, 1898.

Q. 19. State whether or not that was the first knowledge you had of the existence of other insurance?

133 ROSE (at trial): Objects as incompetent, immaterial irrelevant, because the knowledge of the agent would be imputed to the Company.

Overruled. Exception.

A. That was the first intimation or notification we had received of there being other insurance on this property.

G. H. LERMIT.

Sworn to and subscribed before me this 11th day of September, 1903.

ELIZABETH A. GARDINER,
Notary Public.

[SEAL.]

STATE OF ILLINOIS, *County of Cook, ss:*

I, Elizabeth A. Gardiner, a notary public in and for the county of Cook, and State of Illinois, do hereby certify that previous to taking the deposition of Gerald Henry Lermit in this cause, said witness was duly sworn by me to testify to the truth, the whole truth, and nothing but the truth, and that the deposition by him subscribed, as herein set forth, was taken by me in shorthand and reduced to writing and that the same was subscribed by the witness in my presence; and I also certify that said deposition was taken at the time and place set forth in the annexed notice, and that I am not of counsel, attorney, or relative of either party, or otherwise interested in the result of the suit.

134 In witness whereof, I have hereunto set my hand and seal this 11th day of September, 1903.

ELIZABETH A. GARDINER,
Notary Public.

[SEAL.]

DEFENDANT'S EXHIBIT 1. Elizabeth A. Gardiner, Notary Public. District Court, Lancaster County, Nebraska.

GRANDVIEW BUILDING ASSOCIATION
vs.
NORTHERN ASSURANCE COMPANY OF LONDON.

Regist'd.

Grandview Building Association, H. J. Walsh, president, Lincoln, Neb.

DEAR SIRS: We have your favor of the 28th ultimo, enclosing to us what purports to be proof of loss, making claim under our policy No. 310024 of Lincoln, Neb. agency, and issued to you for $2500 on household furniture, etc.—while contained in the three story brick and stone building on lot F in Grandview Residence Park Addition, on account of a fire which occurred on the 1st day of June, 1898, and beg to say in reply, that your sworn statement therein advises us that you had other insurance on this same property to the amount of $1500. This additional insurance held by you was without the knowledge or consent of this company, and was not permitted by agreement as provided for in lines Nos. 11–12 and 13 of the printed conditions of our policy, to which we beg to refer you.

135 We therefore regret to have to advise you, and do now hereby say to you that the Northern Assurance Company specifically and absolutely denies any and all liability under said policy No. 310024, held by you, holding that said policy has been void from the date of its issue by reason of the said provision in regard to other insurance above referred to. Our agents at Lincoln have been instructed to return to you the full premium paid them by you, namely, $33.75 at once.

We further beg to say that we are holding your purported proofs of loss, subject to your order.

Yours very truly,

G. H. LERMIT, *Manager*,
By A. E. CLOUGH, *Ass't.*

Endorsed on back: Filed Sep. 14—1903.

Mr. R. W. BRECKENRIDGE, being produced on behalf of the defendant, was duly sworn, and testified in the narrative form as follows:

I am a member of the firm of Greene & Breckenridge who conducted the defense of the former suit begun in this court, and removed from here to the United States circuit court for the district of Nebraska, then taken to the circuit court of appeals of the eighth circuit, and from there to the Supreme Court of the United States.

Examination-in-chief proceeded, conducted by Mr. GREENE:

Q. Do you know what the expenses of that litigation were to the company?

A. Yes sir.

136 Q. Well, state what the total expense was?

ROSE: Objects as immaterial.

Overruled. Exception.

A. Something over $2200.

Q. That includes attorney's fees and all?

A. Yes sir.

Q. And paid?

A. Yes, paid by the Northern Assurance Company.

Cross-examination by Mr. ROSE:

Q. That includes the trip of yourself and Mr. Greene to Washington when the case was not heard?

A. Yes, the case was on the calendar and we got within half an hour or so of reaching it before the court adjourned.

Q. With the benefit of that experience and practice in that court, you wouldn't go there again without knowing whether the case was on, by telegraphing the clerk, would you?

A. I would go if I supposed the case was on the calendar and waiting for me.

Q. You stayed there a week, didn't you?

A. I think not the first time.

Q. You stayed longer the first time than you would again on an appointment in that court didn't you?

A. I hope not.

Q. If the claim of the plaintiff under this policy had been recognized and paid these expenses wouldn't have been necessary would they?

A. I don't know.

137 Q. Well, these expenses you speak of having been paid outside of court, were expenses intended to avoid the defendant's liability under the policy?

A. They were incurred in an effort that was successful, to prevent recovery.

Redirect examination by Mr. GREENE:

Q. In that very suit?

A. Yes sir.

Q. All the various items were made by things performed in that case weren't they?

A. Yes sir.

Recross-examination by Mr. ROSE:

Q. The plaintiff attended court too in that case didn't he?
A. I think I saw Mr. Walsh there on the trial.
Q. The plaintiff had counsel and attended the various courts by counsel and witnesses didn't he?
A. Yes sir.
Q. Made every appointment and in every court that you did?
A. The plaintiff in that case made every effort to win his case, and his counsel were diligent.

Witness excused.

BRECKENRIDGE: We move the court for a judgment in favor of the defendant on the following grounds:

138 First. There is no competent evidence tending to show that there was any such agreement made between the plaintiff and the agent of the defendant as is specified in the petition. The evidence is not of that clear and convincing character which is required to establish a case for reformation of a contract.

Second. The agent of the company cannot make an oral agreement to insure property already insured, under the terms and conditions of the policy in this case; his only authority was limited to the making of such contract by endorsement upon the policy.

Third. For the further reason that this suit is barred by the statute of limitations.

Fourth. For the further reason that the issues between the plaintiff and the defendant have been litigated in another forum and adjudicated against the plaintiff, and the defendant claims the benefit and protection of that judgment, which was rendered in the United States circuit court for the district of Nebraska, pursuant to the express mandate of the Supreme Court of the United States.

Fifth. The defendant also insists as a further ground that the plaintiff cannot maintain this suit because it elected as between an action at law upon the policy as it is, and a suit to reform it so it should recite consent to concurrent insurance, and in electing in that former suit the defendant was put to great expense and more than $2000 and the plaintiff is estopped from maintaining this action.

Sixth. We further insist that before the plaintiff is entitled to have his case heard here that this suit shall stand abated
139 until the costs of the former suit adjudged against it in more than $400. shall be paid.

Seventh. For the further reason that this court has no jurisdiction to entertain this suit to reform a policy of insurance, upon the facts pleaded in the petition, and sought to be established by proof, for when the reformation of the contract is effected, if it should be effected as prayed in the petition, it would simply amount to giving the plaintiff written evidence of what, under the laws and decisions of the supreme court, he might establish by oral testimony; in other words he gets nothing by reformation, no right or remedy that he

does not already have under the decisions of the supreme court of this State.

In other words, he has an adequate remedy at law.

Defendant rests.

Plaintiff rests.

140 In the District Court of Lancaster County, State of Nebraska.

GRANDVIEW BUILDING ASSOCIATION, Plaintiff,
vs.
NORTHERN ASSURANCE COMPANY, OF LONDON, Defendant.

And the defendants in the above entitled cause in the district court of Lancaster county, third judicial district of Nebraska, having within the time heretofore allowed by the court for that purpose reduced to writing in this its proposed bill of exceptions all of the testimony adduced or offered on both sides of the before named cause in the before named court; all of the objections with the grounds therefor, made to the admission of testimony, all of the rulings of the court on such objections, and all of the exceptions to such rulings made and taken at the time; and having served the same on the attorneys for the above named plaintiff, according to law, for examination and amendment; and the same being now here before me, the undersigned judge, before whom said cause was tried, on the motion of the attorneys for the defendant, that the same may be settled, allowed, signed, sealed and made a part of the record in the said cause in the said court. Now I, the said judge do hereby certify, that this bill of exceptions contains all the evidence adduced or offered by the plaintiff and defendant on the trial of the said cause, all of the objections to the admission of testimony; all of the rulings of the court on such objections; and all of the exceptions taken to such rulings at the time, and

141 I do hereby order, that it be made a part of the record in the said cause in the said court.

Done at Lincoln, Neb., this 11th day of Dec. 1903.

EDWARD. P. HOLMES,
Judge District Court.

STATE OF NEBRASKA, *Lancaster County, ss:*

I, W. C. Phillips, clerk of the district court of Lancaster county, third judicial district of Nebraska, do hereby certify that this is the original bill of exceptions filed in the office of said clerk in said cause.

In testimony whereof, I hereunto set my hand and affix the official seal of said court at Lincoln, this 11th day of December, 1903.

W. C. PHILLIPS,
Clerk District Court,
[SEAL.] By J. S. BAER, *Deputy.*

STATE OF NEBRASKA, *Lancaster County, ss:*

I, Minor S. Bacon, one of the official Reporters of the District court of Lancaster county, Third judicial district of Nebraska do hereby certify that this transcript contains all of the evidence adduced or offered on the hearing of the case of Grandview Building Association *vs.* Northern Assurance Company, at the September A. D. 1903 term of said court.

MINOR S. BACON,
Official Reporter.

Reporter's fee: $10.80.

142 LINCOLN, NEBRASKA, *Nov. 18th,* 1903.

Received my fees in the above entitled case from defendant's attorneys.

MINOR S. BACON,
Official Reporter.

Endorsed on back as follows: 13617 Bill of Exceptions. Supreme Court of Nebraska, Filed Feb. 8 1904 Lee Herdman, Clerk. Clerk's Office District Court, Lancaster County, Nebraska. Filed Dec. 11, 1903. W. C. Phillips, Clerk District Court.

143 And afterwards, to-wit: on the 24th day of May, A. D. 1904, there was filed in the office of the clerk of said supreme court a certain stipulation for continuance, in the words and figures following, to-wit:

Stipulation.

Supreme Court of Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Appellee,
v.
NORTHERN ASSURANCE COMPANY, Appellant.

It is stipulated by and between the parties hereto that this cause may be continued until the September, 1904, term of this court.

HALLECK F. ROSE,
WILMER B. COMSTOCK,
Attorneys for Plaintiff and Appellee.
GREENE, BRECKENRIDGE & KINSLER,
Attorneys for Defendant and Appellant.

Endorsed: 13617 Supreme court of Nebraska. Grand View Building Association, appellee *v.* Northern Assurance Company, appellant. Stipulation. Supreme court of Nebraska Filed May 24 1904 H. C. Lindsay clerk. Greene, Breckenridge & Kinsler, attorneys for appellant.

144 And afterwards, to-wit: on the 8th day of June, A. D. 1904 there was rendered by said supreme court and entered of record upon the journal thereof, a certain order in the words and figures following, to-wit:

GRAND VIEW BUILDING ASSOCIATION, Appellee,
v.
NORTHERN ASSURANCE COMPANY OF LONDON, Appellant.

Appeal from the District Court of Lancaster County. No. 13617.

Upon stipulation of the parties hereto, it is by the court ordered that hearing herein be, and the same hereby is, continued to the September term of this court.

And afterwards, to wit: on the 6th day of September, A. D. 1904, there was filed in the office of the clerk of said supreme court a certain stipulation in the words and figures following, to-wit:

Stipulation.

In the Supreme Court of Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Appellee,
v.
NORTHERN ASSURANCE COMPANY, Appellant.

It is hereby stipulated that this cause shall not be placed upon the assignment of cases for submission until the assignment for
145 the first sitting in October.

HALLECK F. ROSE, *Attorneys for Appellee.*
GREENE, BRECKENRIDGE & KINSLER,
Attorneys for Appellant.

Endorsed: 13617. Supreme court State of Nebraska. Grand View Building Association, appellee *v.* Northern Assurance Company, appellant. Stipulation. Supreme court of Nebraska Filed Sep. 6 1904 H. C. Lindsay clerk. Greene, Breckenridge & Kinsler, attys. for appellant.

And afterwards, to-wit: on the 21st day of September, A. D. 1905, there was rendered by said supreme court, and entered of record upon the journal thereof, a certain order in the words and figures following, to-wit:

GRAND VIEW BUILDING ASSOCIATION, Appellee,
v.
NORTHERN ASSURANCE COMPANY OF LONDON, Appellant.

Appeal from the District Court of Lancaster County. No. 13617.

Upon stipulation of the parties hereto, it is by the court ordered that said cause be, and the same hereby is continued to October 4th, 1904.

146 And afterwards, to-wit: on the 4th day of October, A. D 1904, there was rendered by said supreme court, and entered of record upon the journal thereof, a certain order, in the words and figures following, to-wit:

The following causes were argued by counsel and submitted to the court, to-wit:

* * * * * * *

No. 13617, Grand View Bldg. Assn. *v.* Northern Assurance Co., London, appeal from Lancaster county.

* * * * * * *

And afterwards, to-wit: on the 18th day of January, A. D. 1905, there was rendered by said supreme court, and entered of record upon the journal thereof, a certain judgment in the words and figures following, to-wit:

GRAND VIEW BUILDING ASSOCIATION, Appellee,
v.
NORTHERN ASSURANCE COMPANY OF LONDON, Appellant.

Appeal from the District Court of Lancaster County. No. 13617.

This cause coming on to be heard upon appeal from the district court of Lancaster county, was argued by counsel and submitted to the court; upon full consideration whereof, the
147 court doth find no apparent error in the record of the proceedings and judgment of said district court, and it is therefore considered, ordered and adjudged that the judgment of said district court be, and the same hereby is affirmed; that appellee pay all costs incurred herein by it, taxed at $—, and have and recover from appellants all its costs so expended herein; that appellant pay all costs incurred herein by it, taxed at $—, for all of which execution is hereby awarded, and that a mandate issue accordingly.

And on the same day, to wit, January 18, 1905, there was filed in the office of the clerk of said supreme court an opinion by said court, pursuant to which the aforesaid judgment was rendered, which opinion is in words and figures as follows, to-wit:

147*a* *Opinion. Filed January* 18, 1905.

No. 13617.

GRAND VIEW BUILDING ASSOCIATION

v.

NORTHERN ASSURANCE CO.

Commissioner's Opinion.

1. The statute of limitations relative to actions on written contracts applies to a suit in equity to reform a policy of fire insurance so that it will express consent to concurrent insurance, and to recover on the instrument as so reformed.

2. A suit in equity to reform a policy of fire insurance so that it will express consent to concurrent insurance, and to recover on the instrument as so reformed, may be maintained after the termination of an unsuccessful action at law to recover on the unreformed contract.

3. Evidence examined and found to uphold the findings and judgment of the district court.

147*b* AMES, *C.:*

The "Grand View Building Association," a corporation hereinafter called the Association, obtained a policy of fire insurance upon chattel property belonging to it, from the Northern Assurance Company of London, England, hereinafter called the Insurance Company, or the Company. The policy contained a clause declaring that it should be void if concurrent insurance should be obtained without the consent of the company in writing endorsed thereon. Concurrent insurance was obtained without such written consent, and on June 1st, 1898, the property was totally destroyed by fire. On the 30th of August following, an action was brought on the policy in the district court for Lancaster county. The petition in that action, for the purpose of avoiding the forfeiture, alleged in substance that the concurrent insurance was subsisting at the time the policy in suit was written and was known to exist by the agent of the Company who received and retained the premium, and wrote and delivered the policy, and who had authority to make the written endorsement mentioned, and that by such conduct he waived, for his principal, the making of the writing, and the latter was estopped to insist upon the forfeiture. The company by answer denied the allegations, and at its instance the action was removed to the circuit court of the United States for this district, where it was tried and the jury returned a verdict, finding specially, the foregoing as well as other issues of fact in favor of the plaintiff. Thereupon the plain-

tiff recovered a judgment for the face of the policy, interests
147c and costs. The judgment was affirmed upon proceedings in error in the circuit court of appeals for the 8th circuit and the cause was removed thence, by certiorari, to the Supreme Court of the United States. It was decided by the last named court that the facts pleaded by the plaintiff and found by the jury, were insufficient to relieve from the forfeiture for the reasons, first, because in the absence of fraud or mistake all contemporaneous or previous oral understanding or agreements are conclusively presumed to have been merged in the written contract, and, second, because the contract itself expressly denied to the agent any power to omit, change or waive any of its stipulations or conditions by parol, so that the knowledge or intent of the agent or of the assured or of both could not operate as a waiver or as an estoppel, because if the latter was misled thereby it was due to his own folly. The very contract that he received notified him that he could safely rely upon nothing less or other than an endorsement upon it. The judgments of both the lower courts were therefore reversed and in obedience to a mandate from the supreme court, the circuit court rendered a judgment for the defendant Company upon the merits and for costs. 183 U. S., 308.

On the 21st day of January, 1903, this action was begun in the district court for Lancaster county. The petition recites identically the circumstances set forth in the pleadings of the plaintiff
147d in the former action, but supplements them by alleging that it was the intention of both the plaintiff and the defendant at the time the policy was written, that it should, by its terms, permit the carrying of concurrent insurance, and that its failure so to do was unknown to the plaintiff at the time it was by it received and paid for, and until after the loss by fire, and was due either to the mistake or to the fraud of the agent of the defendant, and that the instrument as it was executed and now exists does not express the real and true contract of the parties thereto. The prayer of the petition is that the policy may be reformed so as to include the alleged omitted permission and that when so reformed the plaintiff may recover thereon.

Issues were joined and after trial findings were made and a judgment rendered according to the averments and prayer of the petition, and the defendant prosecutes this appeal.

No motive is shown for actual fraudulent intent on the part of the agent of the Insurance Company, and it is not attempted to be proved that he was guilty of any, or of any intentional deceit or concealment from which constructive fraud may be inferred. Mistake to be actionable for the reformation of a contract in a court of equity, must be mutual and not due to the gross negligence of the complaining party. These propositions are elementary and are so familiar to the profession that the ci-ation of authority in their support

is not deemed necessary. We have made a careful examina-
147*e* tion of the evidence and the interpretation that we put upon it is the following: There were but three participants in the transaction, Walsh the president and agent of the Association, Borgelt, an agent of the Insurance Company, and Richards, an agent of another insurance company who acted, to some extent, as an intermediary between the other two. Richards testified that he was the first to tell Borgelt that Walsh desired the latter to write $2500 insurance on the property in question, and that he at the same time told him that there was already $1500 insurance upon it with which it was desired that the new policy should be concurrent. Borgelt denied this latter statement and denied that he knew of the existing insurance. Walsh testified that he was present at an interview between the other two in which the subject of concurrent insurance was mentioned and discussed, but he did not attempt to give the conversation or the purport of it in detail. As to what occurred after the instrument had been written and when it was delivered, he testified upon cross examination as follows:

Question. "In the taking of the policy (and) in payment of your premium what or whom did you rely upon as to the form of the policy in which the risk was underwritten?"

Answer. "I relied—I never looked at the policy; I supposed it was like all my policies; I presumed the endorsement was on there, and I did not know for two or three weeks after the fire but that the policy was all right."

147*f* This is in substance the whole case. It is not pretended that there was any specific agreement that the now desired endorsement should be made upon the policy. The whole impression that this evidence makes upon our minds is this: That Walsh desired to obtain from the defendant insurance concurrent with that then existing. That Borgelt the agent, knew of the existing insurance and knew of the desire of Walsh and intended to comply with it but through inadvertence omitted so to do; that he knew of the condition for a forfeiture contained in the policy and knew that it could be avoided only by an endorsement on the instrument. That the failure to make the endorsement was due not to fraud, but to the mistake or inadvertence of the agent, and that the acceptance of the contract by Walsh without the indorsement was due also to his mistake or inadvertence. The evidence falls short of showing that he knew that such an endorsement was necessary. He seems to have had a desire for concurrent insurance and to have made it known to Borgelt, but what form of contract or policy was requisite for that purpose, he does not testify, nor is it otherwise shown, that he knew. That matter he seems to have left to the skill and fidelity of the agent. That he was somewhat negligent in so doing and in accepting and retaining the policy without reading it, is evident, but his negligence in that regard was not greater than that of the agent with which it was concurrent, nor we think greater than that of ordinary

capable and prudent men in the transaction of such affairs.
147*g* The case, we think, falls within the rule laid down in Pomeroy's Equity Jurisprudence, 2nd Ed., volume 2, paragraph 845, and in the cases cited in his note. We quote the paragraph in full.

"The first instance which I shall mention is closely connected with the doctrine stated in the last paragraph but one. It was there shown that if an agreement is what it was intended to be, equity would not interfere with it because the parties had mistaken its legal import and effect. If, on the other hand, after making an agreement, in the process of reducing it to a written form the instrument, by means of a mistake of law, fails to express the contract which the parties actually entered into, equity will interfere with the appropriate relief, either by way of defense to its enforcement, or by cancellation, or by reformation, to the same extent as if the failure of the writing to express the real contract was caused by a mistake of fact. In this instance there is no mistake as to the legal import of the contract actually made; but the mistake of law prevents the real contract from being embodied in the written instrument. In short, if a written instrument fails to express the intention which the parties had in making the contract which it purports to contain, equity will grant its relief, affirmation or defensive, although the failure may have resulted from a mistake as to the legal meaning and operation of the terms or language employed in the writing.

Among the ordinary examples of such errors are those as
147*h* to the legal effect of a description of the subject matter, and as to the import of technical words and phrases; but the rule is not confined to these instances."

Within the rule thus established we think that the evidence supports the findings of fact of the trial judge and that the mistakes of the agent and of Walsh were concurrent and mutual and of a character against which equity will in ordinary cases relieve.

Is the judgment of the Federal court *res adjudicata* and an estoppel to the prosecution of this suit? We think that so far as this jurisdiction is concerned, whatever may be the law elsewhere, this court has conclusively answered this question in the negative. When the plaintiff began the former action it supposed, as is shown by testimony of its counsel preserved in the record, and moreoever was bound to suppose, not only that an action at law on the contract with pleading and proof of oral waiver of the stipulation for forfeiture, was a proper and adequate remedy for the recovery of its loss, but that, because it was so, a suit in equity to obtain a vain and unnecessary reformation of the contract would not lie. Insurance Co. *v.* Norwood, 16 C. C. A., 136; Home Fire Insurance Company *v.* Wood, 50 Nebr., 386.

The plaintiff began its action and prosecuted it to final judgment in reliance upon and in strict conformity with these decisions, the former of which was justified, as the court pronouncing it thought, by

the opinion of the Supreme Court of the United States in
147*i* Insurance Company *v.* Wilkinson, 13 Wall., 233.

To say now that the plaintiff is estopped because it failed in the first instance, to take its cause into a forum whose doors were to all appearances firmly and finally bolted and barred against it, would not fall short of a mockery of justice. The language of this court in State *v.* Bank of Commerce, 61 Nebr., 29, is strictly applicable to the present situation. "One is not precluded from a remedy which the law gives him, because he has attempted to avail himself of one to which he is not entitled." More especially must this be true if the remedy to which he first makes unavailing resort is one which has been expressly and exclusively sanctioned by the very tribunals to which he makes application for it. The same doctrine was reannounced by this court in R. R. Co. *v.* Bigley, 95 N. W. Rep., 345, approving and adopting the language of the supreme court of Indiana in Burch *v.* Grave, 12 N. E. Rep., 514. "A party who imagines he has two or more remedies, but who misconceives his rights is not to be deprived of all remedy because he first tries a wrong one * * * * justice ought not to be wholly denied because she mistook her remedy in the first place." Nor, it may be well to add, because the first and only really prejudicial and misleading error, if it was an error, which we much doubt, was not made by the litigant but by the ministers of justice themselves. To the same effect are Pekin Plow Co. *v.* Wilson, 92 N. W. Rep. (Nebr.), 178;
Omaha *v.* Redick, 61 Nebr., 163; Simons *v.* Fagan, 62 Nebr.
147*j* 287; Lansing *v.* Insurance Co., 93 N. W. Rep. (Nebr.), 756.

The former suit was not inconsistent with this, but in that case the plaintiff sought to treat the contract as having been, in effect, reformed by the circumstances of its execution, which it was claimed waived or annulled one of its covenants. The Supreme Court held, and in practical effect it held nothing more, that the supposed reformation had not been accomplished. Thereupon the plaintiff resorted to this suit to secure its accomplishment, and for his right so to do he may quote no less authority than Mr. Chief Justice Marshall, who in Parker *v.* Judges, 12 Wheat., 56, says that one who proposes to "try a question entirely new, which has not been and could not be litigated at law, may do so before the commencement of a suit at law, pending such suit, or after its decision by the highest judicial tribunal."

From the final decision in the former action, four out of the nine judges of the United States Supreme Court dissented. The opinion of the majority, being an adherence to the letter of an antiquated and worn out technical formality, seems to us to be an ironical commentary upon the often repeated judicial boast, that the law is a progressive science and that the courts are continually adapting their processes and proceedings to changing social and business needs and customs. Either so, or else, as we consider, the court fell

into a still more grievous error. The familiar maxim that
147*k* equity regards that as having been done which was agreed to be and ought in good conscience to have been done, has not for a long time been a stranger in courts of law in cases in which equitable matters are properly in issue. It is admitted on all hands that the agent Borgelt, had authority to bind his principal by executing the desired written sitpulation for concurrent insurance. The greater includes the less. If he had power to enter into the covenant he also had power to agree to enter into it. And if for value he made such an agreement, and through fraud or mistake failed to keep it, his failure is actionable both at law and in equity. It is upon such failure that this action is grounded. The parties did not waive written consent to concurrent insurance, or attempt so to do, but on the contrary agreed that it should be given. It is because of such agreement and because such consent was mistakenly or accidentally omitted that the plaintiff is entitled to have the contract reformed. Besides, the place where the contract was made, and where by its terms it was to be performed, and where the subject of it was situated, is in Nebraska. We are at a loss to understand why the laws of Nebraska, as expounded by the highest court of the State, are not conclusive of its obligatory force and of its meaning and effect, if not of the remedy appropriate to its enforcement. It is another familiar and often quoted maxim that the law enters into and becomes an inseparable part of, every contract. We desire to be told what law,
147*l* other than that of Nebraska, became thus incorporated into the contract in suit. The defendant contends that this action is barred by a limitation written in the policy, and by the statute, and it is insisted that the decisions of this court in Miller *v.* State insurance Co., 54 Nebr., 121, and Insurance Company *v.* Drennan, 56 Nebr., 623, ought to be overruled. We are entirely satisfied with both the reasoning and conclusions in those cases. A man may not, by contract, deprive himself of the right to apply to the courts for the protection of his person, property or liberty in the manner or within the time prescribed by public law. Otherwise he might be permitted to sell himself into servitude. Section 10 of the code enacts a limitation of five years for the commencement of actions accruing upon written contracts, and section 12 provides that an action for relief on the ground of fraud shall be brought within four years after the discovery of the cause therefor.

It is not disputed that an attempt to take unfair advantage of a mutual mistake is constructive fraud that falls within the latter provision. This action was brought less than five years after the destruction of the insured property by fire, but more than four years after the discovery of the mistake in the terms of the policy. The question which provision of the statute of limitations applies is not free from difficulty, but we have come with some hesitation to the conclusion that it is the former of them. If the sole object of the action was to obtain relief from the consequences of fraud or
147*m* to recover money or property obtained by its means, doubtless the four year limitation would govern, but actions like

the present, are, we think, founded upon the written contract and the aid of equity is requisite, in those jurisdictions in which it is required at all, merely as auxiliary thereto, for the purpose largely, of interpretation, so as to enable the court to read and understand the contract as it was understood by the parties at the time they entered into it. Without the written policy, there would have been no contract between the parties at all, however, much they might have conferred with the reference to the terms of one if made, but the instrument when written and accepted, was obligatory upon both and the plaintiff can recover only for a breach of it. The aid of equity is required merely to enable him to show that he is not, in good conscience, to be held, as he is charged with being, guilty of committing the first breach of it. And, to establish that a certain stipulation which ought to have been, and which the parties intended should be, included in it, was mistakenly omitted. When equity has made the desired correction, according to the pleading and proof, it proceeds to enforce, not only the newly incorporated covenant, but the formal written contract as amended. Indeed, it could not do otherwise, because the omitted stipulation, standing alone, would be meaningless. This view, we think, is in harmony with previous decisions both in this court and elsewhere. Gwyer *v.* Spaulding, 33
147*n* Nebr., 580; Baldwin *v.* Burt, 43 Nebr., 256; Hyde *v.* Insurance Company, 97 N. W. Rep. (Nebr.), 629; Winchell *v.* Coney, 27 Fed. Rep., 482; Dodge *v.* Insurance Co., 78 Mass., 71; Wood on Limitations, (3rd Edl) Sec. 58, page 137.

For the foregoing reasons we are of the opinion that the judgment of the district court is right and we recommend that it be affirmed.

Letton, C. and Oldham, C. concur.

By the COURT: For the reasons stated in the foregoing opinion it is ordered that the judgment of the district court be affirmed.

147*o* And afterwards, to-wit, on the 20th day of February, A. D., 1905, there was filed in the office of the clerk of said supreme court a certain motion for rehearing, in the words and figures following, to-wit:

Supreme Court of Nebraska.

No. 13617.

GRAND VIEW BUILDING ASSOCIATION, Appellee,
v.
NORTHERN ASSURANCE COMPANY OF LONDON, Appellant.

Motion for Rehearing.

Greene, Breckenridge & Kinsler, attorneys for appellant.

Comes now appellant and moves the court to vacate its decision pursuant to the opinion filed herein on January 18th, 1905, and to grant a rehearing in this case for the following reasons:

148 I.

The defendant pleaded as a defense to this suit the following provision of its policy:

"No suit or action on this policy, for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements nor unless commenced within twelve months next after the fire."

The insured property was burned June 1, 1898. The petition in this suit was filed January 21, 1903. Another suit between the same parties upon the identical cause of action involved herein was begun August 30th, 1898, and was terminated adversely to the Grand View Building Association by the judgment entered in the United States circuit court for the district of Nebraska on May 12, 1902.

Sections 5 and 10 of Title II Code of Civil Procedure of Nebraska are as follows:

"SEC. 5. Civil actions can only be commenced within the time prescribed in this title, after the cause of action shall have accrued.

SEC. 10. Within five years, an action upon a specialty, or any agreement, contract, or promise in writing, or foreign judgment."

Your honors have construed said sections to annul the above clause of the written contract between the parties to this suit which requires the assured to bring its action within twelve months next after the fire; and said sections five and ten of Title II, Code of Civil
149 Procedure of Nebraska, as thus construed by this court, impair the obligation of the contract between the parties hereto and violate section 10 article 1, Constitution of the United States.

II.

The defendant pleaded both sections 10 and 12 Title II Code of Civil Procedure of Nebraska in defense of this suit. Section 10 referred to is the five year statute of limitations and section twelve is the four year statute, and is as follows:

"SEC. 12. Within four years * * * an action for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud."

Your honors say of that section and in this case that an attempt to take unfair advantage of a mutual mistake is constructive fraud that falls within the latter provision.

The five-year statute was pleaded upon the theory that the plaintiff was chargeable upon the receipt of its policy with knowledge of its terms and that it did not contain the stipulation which in this suit it seeks to have added thereto; and the four-year statute was pleaded on the theory that at all events plaintiff was advised of the omission of the alleged stipulation at the time it brought its former suit, which was more than four years prior to the commencement of this suit. Your honors erred in applying the five-year statute of limitations and permitting it to protect the plaintiff in a suit brought more than four years but less than five years after the fire.

III.

The appellant in its answer herein pleaded in bar of this suit the judgment of the United States circuit court for the district of
150 of Nebraska entered May 12, 1902, in a suit between the parties hereto, upon the cause of action involved herein, which judgment was entered pursuant to the mandate of the Supreme Court of the United States in Northern Assurance Company *v.* Grand View Building Association, 183 U S 308. Said judgment constitutes a conclusive adjudication between the parties to this suit upon the controversy involved herein. This court refused to give effect to said judgment of the United States circuit court for the district of Nebraska so entered pursuant to the mandate of the Supreme Court of the United States, as an adjudication between the parties upon the controversy herein, saying: "We think that so far as this jurisdiction is concerned, whatever may be the law elsewhere, this court has conclusively answered this question in the negative." Speaking of the opinion of the Supreme Court of the United States your honors characterize it as "an adherence to the letter of an antiquated and worn-out technical formality."

This court, therefore, refused to follow the judgment of the Supreme Court of the United States because it does not agree with the principle upon which its decision was rendered; and in so doing violated section 2 article 3 of the Constitution of the United States in controversies between citizens of the different states and between citizens of states and citizens of a foreign country, and the act of Congress of March 30, 1887 as amendedd August 13, 1888; and also violated section 2 of article 6 of the Constitution which makes it and the laws of the United States made in pursuance thereof, the supreme law of the land.

The decision and judgment of this court will deprive the
151 appellant of its property without due process of law and will deny to it the equal protection of the laws, contrary to the 14th amendment to the Constitution of the United States; in all of which the court grievously erred.

IV.

The judgment of this court is unsupported by the facts.

Wherefore appellant prays that upon the rehearing of this cause the judgment of the district court of Lancaster county, Nebraska may be reversed and the suit dismissed.

NORTHERN ASSURANCE COMPANY
OF LONDON,
By GREENE, BRECKENRIDGE & KINSLER,
Its Attorneys.

Endorsed: 13617 Supreme court of Nebraska. No. 13617. Grand View Building Ass'n, appellee *v.* Northern Assurance Company of London, appellant. Motion for rehearing. Supreme court of Ne-

braska Filed Feb. 20 1905 H. C. Lindsay clerk. Greene, Breckenridge & Kinsler, attorneys for appellant.

And afterwards, to-wit: on the 3rd day of May, A. D. 1905, there was rendered by said supreme court, and entered of record upon the journal thereof, a certain order, in the words and figures following, to-wit:

GRAND VIEW BUILDING ASSOCIATION, Appellee,
v.
NORTHERN ASSURANCE COMPANY OF LONDON, Appellant.

Appeal from the District Court of Lancaster County. No. 13617.

152 This cause coming on to be heard upon motion of the appellant for a rehearing herein, was fully considered by the court, and no error appearing in the judgment heretofore entered herein by this court, it is therefore considered, ordered and adjudged that said motion be, and the same hereby is overruled, and a rehearing herein refused and denied.

And afterwards, on the same day, to-wit: the 3rd of May, A. D. 1905, there was rendered by said supreme court and entered of record upon the journal thereof, a certain order, in the words and figures as follows, to-wit:

GRAND VIEW BUILDING ASSOCIATION, Appellee,
v.
NORTHERN ASSURANCE COMPANY OF LONDON, Appellant.

Appeal from the District Court of Lancaster County. No. 13617.

It is by the court ordered that the mandate herein shall be withheld for thirty days.

153 And afterwards, to-wit, on the 25th day of May, 1905, the further following proceedings were had in said cause, viz:

GRAND VIEW BUILDING ASSOCIATION, Appellee,
v.
NORTHERN ASSURANCE COMPANY OF LONDON, Appellant.

Now at this day, there is presented to the Honorable Silas A. Holcomb, chief justice of the supreme court of the State of Nebraska, in chambers, a petition for a writ of error, a writ of error to the Supreme Court of the United States, a citation directed to said appellant, citing and admonishing it to appear at a Supreme Court of the United States on the 22nd day of June, 1905; an assignment of

errors and a bond in the sum of five thousand ($5,000.00) dollars, which said writ of error is allowed, said citation signed, said assignment of errors filed and said bond approved, ordered filed and made a part of the record herein.

Which said petition for writ of error is in words and figures as follows, to-wit:

154 *Petition for Writ of Error.*

The Supreme Court of Nebraska.

NORTHERN ASSURANCE COMPANY OF LONDON, Appellant,
v.
GRAND VIEW BUILDING ASSOCIATION, Appellee.

To the Honorable Silas A. Holcomb, chief justice of the supreme court of Nebraska:

The petition of Northern Assurance Company of London respectfully shows that on the eighteenth day of January, 1905, the supreme court of the State of Nebraska rendered a final judgment against your petitioner in a certain cause therein pending wherein your petitioner, Northern Assurance Company of London, was appellant and Grand View Building Association was appellee, and for costs; and that on the third day of May, 1905, said supreme court refused to grant your petitioner a rehearing of said cause, all of which will appear by reference to the record of the proceedings therein; that said court is the highest court in said State in which a decision in said suit could be had; and your petitioner feeling aggrieved by the judgment of said the supreme court of Nebraska claims the right to remove said judgment to the Supreme Court of the United States by writ of error under section 709 of the Revised Statutes of the United States for the following errors committed by said supreme court of Nebraska as shown in the record of said cause to wit:

I.

Because in its opinion and judgment affirming the judgment of the district court of Lancaster county upon the issues herein in favor of the appellee the supreme court of Nebraska erred in this: That the issues herein were fully and finally litigated and adjudged in favor of the appellant and petitioner in a former action between the parties hereto in the case of Grand View Building Association
155 *v.* Northern Assurance Company of London, wherein judgment was duly rendered by the circuit court of the United States for the district of Nebraska, pursuant to the opinion and judgment of the Supreme Court of the United States in the case of Northern Assurance Company of London *v.* Grand View Building Association, reported in volume 183 of its reports at page 308 *et seq.*, which said judgment of the circuit court of the United States was

by the appellant and petitioner herein pleaded in bar of the present suit and relied upon as a defense both in the district court and upon the subsequent hearing in the supreme court of the State, by which plea the appellant and petitioner herein claimed the benefit and protection of the opinion and judgments of the United States courts aforesaid and which opinion and judgments the district court and the supreme court of the State refused to consider, and thereby denied the appellant and petitioner the benefit and protection thereof, in violation of section two, article three and section two, article six of the Constitution of the United States, and the acts of Congress made pursuant thereto, and section one, article fourteen of the amendments to the Constitution of the United States.

II.

Because this court herein denied to the appellant and petitioner the benefit, advantage and protection of its judgment against the appellee upon the same issues as are involved herein, which was rendered by the circuit court of the United States for the district of Nebraska, pursuant to the opinion and judgment of the Supreme Court of the United States in the case of Northern Assurance Company of London *v.* Grand View Building Association, reported in volume 183 of its reports at page 308 *et seq.*, which judgment of the circuit court of the United States for the district of Nebraska was duly pleaded herein by the appellant and petitioner in bar of this suit, in violation of section two, article three, and section two,, article six of the Constitution of the United States, and the acts of Congress made pursuant thereto, and section one, article fourteen of the amendments to the Constitutions of the United States.

156 III.

Because this court erred in affirming the judgment of the district court of Lancaster county, Nebraska herein for the reason that said Grand View Building Association was permitted in this suit in said district court of Lancaster county to relitigate under the guise of a different form of action the questions and matters already adjudicated between the parties to this suit and which were finally decided and adjudged by the Supreme Court of the United States in Northern Assurance Company of London *v.* Grand View Building Association, 183 U. S. 308 *et seq.*, in violation of section two, article three and section two, article six of the Constitution of the United States and the acts of Congress made pursuant thereto, and section one, article fourteen of the amendments to the Constitution of the United States.

IV.

Because the supreme court of the State of Nebraska in its opinion and judgment herein denied to the appellant and petitioner the

benefit and protection of its judgment previously rendered between the parties hereto upon the same issues by the circuit court of the United States for the district of Nebraska, pursuant to the opinion and judgment of the Supreme Court of the United States in the case of Northern Assurance Company of London *v.* Grand View Building Association, reported in volume 183 of its reports at page 308 *et seq.*, in this: That — its opinion and judgment herein the supreme court of the State of Nebraska held and adjudged that the provisions of the written policy in controversy were not in full force and effect between the parties hereto at and before the fire described in the evidence, whereas the circuit court of the United States had previously held and adjudged in the manner and case aforesaid that the provisions of said policy were in full force and effect at the times aforesaid, and which opinion and judgments of the United States courts the appellant and petitioner have duly pleaded in bar of the present suit. And which opinion and judgment of the supreme court of the State of Nebraska is in violation of section two,
157 article three, and section two, article six of the Constitution of the United States, and the acts of Congress made pursuant thereto, and section one, article fourteen of the amendments to the Constitution of the United States.

V.

Because the supreme court of the State of Nebraska in its opinion and judgment herein denied to the appellant and petitioner the benefit and protection of its judgment previously rendered, between the parties hereto, upon the same issues, by the circuit court of the United States for the district of Nebraska, pursuant to the opinion and judgment of the Supreme Court of the United States in the case of Northern Assurance Company of London *v.* Grand View Building Association, reported in volume 183 of its reports at page 308 *et seq.*, in this: That in its opinion and judgment herein the supreme court of the State of Nebraska held and adjudged that the following provision contained in the written policy in controversy, to-wit:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the assured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

was of no force and effect between the parties hereto at and before the fire described in the evidence, whereas the circuit court of the United States had previously held and adjudged in the manner aforesaid that the provision aforesaid was in full force and effect at the times aforesaid and which opinion and judgment of the United States courts the appellant and petitioner *have* duly pleaded in bar of the present suit. And which opinion and judgment of the supreme court of the State of Nebraska is in violation of section two, article three, and section two, article six of the Constitution of the

United States, and the acts of Congress made pursuant thereto, and section one, article fourteen of the amendments of the Constitution of the United States.

158 VI.

Because the supreme court of the State of Nebraska in its opinion and judgment herein denied to the appellant and petitioner the benefit and protection of its judgment previously rendered between the parties hereto upon the same issues by the circuit court of the United States for the district of Nebraska, pursuant to the opinion and judgment of the Supreme Court of the United States in the case of Northern Assurance Company of London *v.* Grand View Building Association, reported in volume 183 of its reports at page 308 *et seq.*, in this: That in its opinion and judgment herein the supreme court of the State of Nebraska held and adjudged that the following provision of the written policy in controversy, to-wit:

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed herein or added thereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

was of no force and effect between the parties hereto at and before the fire described in the evidence, whereas the circuit court of the United States for the district of Nebraska had previously held and adjudged in the manner aforesaid that the provisions of said policy were of full force and effect at the times aforesaid and which opinion and judgments of the United States courts the appellant and petitioner *have* duly pleaded in bar of the present suit. And which opinion and judgment of the supreme court of the State of Nebraska is in violation of section two, article three and section two, article six of the Constitution of the United States, and the acts of Congress made pursuant thereto and section one, article fourteen of the amendments to the Constitution of the United States.

159 VII.

Because the supreme court of the State of Nebraska in its opinion and judgment herein denied to the appellant and petitioner the benefit and protection of its judgment previously rendered between the parties hereto upon the same issues by the circuit court of the United States for the district of Nebraska, pursuant to the opinion and judgment of the Supreme Court of the United States in the case of North-

ern Assurance Company of London *v.* Grand View Building Association, reported in volume 183 of its reports at page 308 *et seq.*, in this: That in its opinion and judgment herein the supreme court of the State of Nebraska held and adjudged that the alleged oral understanding or agreement between the appellee and the agent of the appellant and petitioner to the effect that the insurance company would permit concurrent insurance contrary to the express terms of the written policy in controversy was in full force and effect between the parties hereto at and before the fire described in the evidence, whereas the United States courts had previously held and adjudged in the manner aforesaid that as against the express terms of the policy no such understanding or agreement existed, which opinion and judgments were duly pleaded by the appellant and petitioner in bar of the present suit. And which opinion and judgment of the supreme court of the State of Nebraska is in violation of section two, article three, and section two, article six of the Constitution of the United States, and the acts of Congress made pursuant thereto, and section one, article fourteen of the amendments to the Constitution of the United States.

VIII.

Because this court erred in this, to-wit: The appellant and petitioner pleaded as a defense to this suit the following provision of its policy:

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

The insured property was burned June 1, 1898. The peti-
160 tion in this suit was filed January 21, 1903, and this action is barred under the policy according to its terms. Sections five and ten, title II of the Code of Civil Procedure of Nebraska are as follows:

"SEC. 5. Civil actions can only be commenced within the time prescribed in this title after the cause of action shall have accrued.

SEC. 10. Within five years an action upon a specialty or any agreement, contract, or promise in writing, or foreign judgment."

The supreme court of Nebraska construed said sections of the Code of Civil Procedure above quoted to annul the above clause of the written contract between the parties to this suit, which requires the assured to bring its action within twelve months next after the fire; and said sections five and ten, Title II, Code of Civil Procedure of Nebraska, as thus construed by the supreme court of Nebraska, impair the obligation of the contract between the parties hereto as above recited, and as thus construed, said sections violate section ten, article one of the Constitution of the United States.

Wherefore appellant and petitioner says that it has been denied its rights under the Constitution and laws of the United States, and prays that it may be awarded a writ of error by this honorable court,

issuing out of the Supreme Court of the United States, addressed to this honorable court, for the purpose of enabling said Supreme Court of the United States to examine and correct the errors assigned, by the reversal of the judgment of this honorable court, and for such other and further proceedings as to the said Supreme Court of the United States may seem proper.

GREENE, BRECKENRIDGE & KINSLER,
Attorneys for Northern Assurance Company of London, Appellant and Petitioner.

Let the writ issue as prayed.
Supersedeas is fixed at $5000.
May 25, 1905.

SILAS A. HOLCOMB,
Chief Justice of the Supreme Court of Nebraska.

160½ [Endorsed:] 13617. The Supreme Court of Nebraska. Northern Assurance Company of London, Appellant, *v.* Grand View Building Association, Appellee. Petition for writ of error. Greene, Breckenridge & Kinsler attorneys for Northern Assurance Company of London, appellant and petitioner. Supreme Court of Nebraska Filed May 25 1905 H. C. Lindsay clerk.

161 Which said assignment of errors is in words and figures as follows, to-wit:

162 *Assignment of Errors.*

Supreme Court of the United States.

NORTHERN ASSURANCE COMPANY OF LONDON, Plaintiff in error,
v.
GRAND VIEW BUILDING ASSOCIATION, Defendant in error.

Now comes the Northern Assurance Company of London, plaintiff in error, by its counsel and respectfully submits that in the record, proceedings, decision, and final judgment of the State of Nebraska in the above entitled cause there is manifest error in this, to-wit:

I.

Because the supreme court of Nebraska erred in affirming the judgment of the district court of Lancaster county upon the issues herein in favor of the appellee in this: That the issues herein were fully and finally litigated and adjudged in favor of the plaintiff in error in a former action between the parties hereto in the case of Grand View Building Association *v.* Northern Assurance Company of London, wherein judgment was duly rendered by the circuit court

of the United States for the district of Nebraska, pursuant to the opinion and judgment of the Supreme Court of the United States in the case of Northern Assurance Company of London *v.* Grand View Building Association, reported in volume 183 of its reports at page 308 et seq., which said judgment of the circuit court of the United States was by the plaintiff in error herein pleaded in bar of the present suit and relied upon as a defense both in the district court and upon the subsequent hearing in the supreme court of the State, by which plea the plaintiff in error herein claimed the benefit and protection of the opinion and judgments of the United States courts aforesaid and which opinion and judgments the district court and the supreme court of the State refused to consider, and thereby denied the plaintiff in error the benefit and protection thereof, in violation of section two, article three and section two article
163 six of the Constitution of the United States, and the acts of Congress made pursuant thereto, and section one, article fourteen of the amendments to the Constitution of the United States.

II.

Because the supreme court herein denied to the plaintiff in error the benefit, advantage and protection of its judgment against the appellee upon the same issues as are involved herein, which was rendered by the circuit court of the United States for the district of Nebraska, pursuant to the opinion and judgment of the Supreme Court of the United States in the case of Northern Assurance Company of London *v.* Grand View Building Association, reported in volume 183 of its reports at pages 308 *et seq.*, which judgment of the circuit court of the United States for the district of Nebraska was duly pleaded herein by the plaintiff in error in bar of this suit, in violation of section two, article three, and section two, article six of the Constitution of the United States, and the acts of Congress made pursuant thereto, and section one, article fourteen of the amendments to the Constitution of the United States.

III.

Because the supreme court of Nebraska erred in affirming the judgment of the district court of Lancaster county, Nebraska herein for the reason that said Grand View Building Association was permitted in this suit in said district court of Lancaster county to relitigate under the guise of a different form of action the questions and matters already adjudicated between the parties to this suit and which were finally decided and adjudged by the Supreme Court of the United States in Northern Assurance Company of London *v.* Grand View Building Association, 183 U. S. 308 *et seq.*, in violation of section two, article three and section two, article six of the Constitution of the United States, and the acts of Congress made pursuant thereto, and section one, article fourteen of the amendments of the Constitution of the United States.

164 IV.

Because the supreme court of the State of Nebraska in its opinion and judgment herein denied to the plaintiff in error the benefit and protection of its judgment previously rendered between the parties hereto upon the same issues by the circuit court of the United States for the district of Nebraska, pursuant to the opinion and judgment of the Supreme Court of the United States in the case of Northern Assurance Company of London *v.* Grand View Building Association, reported in volume 183 of its reports at page 308 *et seq.*, in this: That in its opinion and judgment herein the supreme court of the State of Nebraska held and adjudged that the provisions of the written policy in controversy were not in full force and effect between the parties hereto at and before the fire described in the evidence, whereas the circuit court of the United States had previously held and adjudged in the manner aforesaid that the provisions of said policy were in full force and effect at the times aforesaid, and which opinion and judgments of the United States courts the plaintiff in error has duly pleaded in bar of the present suit. And which opinion and judgment of the supreme court of the State of Nebraska is in violation of section two, article three, and section two, article six of the Constitution of the United States, and the acts of Congress made pursuant thereto, and section one, article fourteen of the amendments to the Constitution of the United States.

V.

Because the supreme court of the State of Nebraska in its opinion and judgment herein denied to the plaintiff in error the benefit and protection of its judgment previously rendered between the parties hereto, upon the same issues, by the circuit court of the United States for the district of Nebraska, pursuant to the opinion and judgment of the Supreme Court of the United States in the case of Northern Assurance Company of London *v.* Grand View Building Association, reported in volume 183 of its reports at page 308 *et seq.*, in this: That in its opinion and judgment herein the supreme
165 court of the State of Nebraska held and adjudged that the following provision contained in the written policy in controversy, to-wit:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the assured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

was of no force and effect between the parties hereto at and before the fire described in the evidence, whereas the circuit court of the United States had previously held and adjudged in the manner aforesaid that the provision aforesaid was in full force and effect at the times aforesaid and which opinion and judgment of the United

States courts the plaintiff in error has duly pleaded in bar of the present suit. And which opinion and judgment of the supreme court of the State of Nebraska is in violation of section two, article three, and section two, article six of the Constitution of the United States, and the acts of Congress made pursuant thereto, and section one, article fourteen of the amendments of the Constitution of the United States.

VI.

Because the supreme court of the State of Nebraska in its opinion and judgment herein denied to the plaintiff in error the benefit and protection of its judgment previously rendered between the parties hereto upon the same issues by the circuit court of the United States for the district of Nebraska, pursuant to the opinion and judgment of the Supreme Court of the United States in the case of Northern Assurance Company of London *v.* Grand View Building Association, reported in volume 183 of its reports at page 308 *et seq.*, in this: That in its opinion and judgment herein the supreme court of the State of Nebraska held and adjudged that the following provision of the written policy in controversy, to-wit:

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed herein or added thereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

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was of no force and effect between the parties hereto at and before the fire described in the evidence, whereas the circuit court of the United States for the district of Nebraska had previously held and adjudged in the manner aforesaid that the provisions of said policy were of full force and effect at the times aforesaid and which opinion and judgments of the United States courts the plaintiff in error has duly pleaded in bar of the present suit. And which opinion and judgment of the supreme court of the State of Nebraska is in violation of section two, article three and section two, article six of the Constitution of the United States, and the acts of Congress made pursuant thereto and section one, article fourteen of the amendments to the Constitution of the United States.

VII.

Because the supreme court of the State of Nebraska in its opinion and judgment herein denied to the plaintiff in error the benefit and

protection of its judgment previously rendered between the parties hereto upon the same issues by the circuit court of the United States for the district of Nebraska, pursuant to the opinion and judgment of the Supreme Court of the United States in the case of Northern Assurance Company of London *v.* Grand View Building Association, reported in volume 183 of its reports at page 308 *et seq.*, in this: That in its opinion and judgment herein the supreme court of the State of Nebraska held and adjudged that the alleged oral understanding or agreement between the defendant in error and the agent of the plaintiff in error to the effect that the insurance company would permit concurrent insurance contrary to the express terms of the written policy in controversy was in full force and effect between the parties hereto at and before the fire described in the evidence, whereas the United States courts had previously hel[illegible]nd adjudged in the manner aforesaid that as against the ex[illegible]ess terms of
167 the policy no such understanding or agreement existed, which opinion and judgments were duly pleaded by the plaintiff in error in bar of the present suit. And which opinion and judgment of the supreme court of the State of Nebraska is in violation of section two, article three, and section two, article six of the Constitution of the United States, and the acts of Congress made pursuant thereto, and section one, article fourteen of the amendments to the Constitution of he United States.

VIII.

Because the supreme court of Nebraska erred in its judgment herein in this, to-wit: The plaintiff in error pleaded as a defense to this suit the following provision of its policy:

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

The insured property was burned June 1, 1898. The petition in this suit was filed January 21, 1903, and thi saction is barred under the policy according to its terms. Sections five and ten, title II of the Code of Civil Procedure of Nebraska are as follows:

"SEC. 5. Civil actions can only be commenced within the time prescribed in this title after the cause of action shall have accrued.

SEC. 10. Within five years an action upon a specialty or any agreement, contract, or promise in writing, or foreign judgment."

The supreme court of Nebraska construed said sections of the Code of Civil Procedure above quoted to annul the above clause of the written contract between the parties to this suit, which requires the assured to bring its action within twelve months next after the fire; and said sections five and ten, title II, Code of Civil Procedure of Nebraska, as thus construed by the supreme court of Nebraska, impair the obligation of the contract between the parties hereto as above recited, and as thus construed, said sections violate section ten, article one of the Constitution of the United States.

Wherefore plaintiff in error, Northern Assurance Company of London, prays that said judgment of the supreme court of
168 Nebraska may be reversed, with directions to said supreme court of Nebraska to reverse the judgment rendered in said cause by the district court of Lancaster county, Nebraska.

CHARLES J. GREENE,
RALPH W. BRECKENRIDGE,
Attorneys for Plaintiff in Error.

168½ Endorsed: 13617. Supreme Court of the United States Northern Assurance Company of London, plaintiff in error *v.* Grand View Building Association, defendant in error Assignment of errors. Charles J. Greene, Ralph W. Breckenridge, attorneys for plaintiff in error. Supreme Court of Nebraska. Filed May 25, 1905. H. C. Lindsay, clerk.

169 Which said bond is in words and figures as follows, to-wit:

(Copy)

Know all men by these presents, that we, Northern Assurance Company of London, as principal, and National Surety Co. of New York as surety, are held and firmly bound unto Grand View Building Association in the full and just sum of five thousand ($5000.00) dollars, to be paid to the said Grand View Building Association, its certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our successors, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of May, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a term of the supreme court of Nebraska, in a suit depending in said court, between Grand View Building Association, appellee, and Northern Assurance Company of London, appellant, a judgment was rendered against the said Northern Assurance Company of London, and the said Northern Assurance Company of London having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Grand View Building Association, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington,
170 within thirty days from the date thereof.

Now, the condition of the above obligation is such that if the said Northern Assurance Company of London shall prosecute its said writ to effect, and answer all damages and costs if it fail to make

its plea good, then the above obligation to be void; else to remain in full force and virtue.

NORTHERN ASSURANCE COMPANY OF LONDON, [SEAL]
By GREENE, BRECKENRIDGE & KINSLER,
Its Attorneys.

Sealed and delivered in the presence of
MINNIE CRITTENDEN.

NATIONAL SURETY COMPANY,
By R. A. LENSSLER, [SEAL]
Resident Vice Pres't.

Attest: JAY D. FOSTER,
Resident Ass't Secretary.

Approved by
SILAS A. HOLCOMB,
Chief Justice of the Supreme Court of Nebraska.

Endorsed: 13617. Northern Assurance Company of London, plaintiff in error, *v.* Grand View Building Association, defendant in error. Supersedeas bond. Supreme court of Nebraska Filed May 25 1905. H. C. Lindsay, clerk.

171 STATE OF NEBRASKA, *ss:*

I, H. C. Lindsay, clerk of the supreme court of the State of Nebraska, hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings in the above entitled cause, as fully as the same remain of record and on file in my office.

In testimony whereof, I hereunto set my hand and cause to be affixed the seal of said supreme court, at Lincoln, this 25th day of May, 1905.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of the Supreme Court of Nebraska,
By VICTOR SEYMOUR, *Deputy.*

172 *Stipulation with Regard to Omitting Certain Parts of the Transcript from the Printed Record.*

Supreme Court of the United States.

NORTHERN ASSURANCE COMPANY, Plaintiff in Error,
v.
GRAND VIEW BUILDING ASSOCIATION, Defendant in Error.

It is hereby stipulated and agreed betwween the parties hereto that Exhibit A, being a copy of the original policy of insurance involved in this litigation, attached to the original petition in this suit, filed in the district court of Lancaster county, Nebraska, and found on manuscript page 16 of the transcript from the supreme court of Nebraska, may be omitted from the printed record herein, as said policy is attached to the printed record of the former case in this court between these parties under the same title, numbered 17753, which record in said former case is a part of the stipulation of facts in this suit.

It is also agreed that Defendant's Exhibits B, C and D, found on pages 109, 110, and 111 of the transcript from the supreme court of Nebraska may be omitted from the printed record herein, said Exhibits B, C and D being the whole of certain briefs in the former case between these parties that were filed in the circuit court of appeals for the eighth circuit and in the Supreme Court of the United States, and from which briefs Plaintiff's Exhibits 4, 5, 6, 7 and 8 were taken, as they appear on pages 104, 105, 106, 107 and 108 of the transcript herein from the supreme court of Nebraska.

CHARLES J. GREENE,
RALPH W. BRECKENRIDGE,
Attorneys for Plaintiff in Error.
HALLECK F. ROSE,
WILMER B. COMSTOCK,
Attorneys for Defendant in Error.

Dated June 1, 1905.

173 [Endorsed:] File No. 19,793. Supreme Court U. S. October Term, 1905. Term No. 291. Northern Assurance Co., of London, plff. in error *vs.* Grand View Building Association. Stipulation to omit certain portions of record in printing. Filed June 7th, 1905.

Endorsed on cover: File No. 19,793. Nebraska supreme court. Term No. 291. Northern Assurance Company of London, plaintiff in error, *vs.* Grand View Building Association. Filed June 7th, 1905. File No. 19,793.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 40

NORTHERN ASSURANCE COMPANY OF LONDON,
PLAINTIFF IN ERROR,

vs.

GRAND VIEW BUILDING ASSOCIATION.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

CHARLES J. GREENE,
RALPH W. BRECKENRIDGE,
ATTORNEYS FOR PLAINTIFF IN ERROR.

LEW. W. RABER, PRINTER, OMAHA.

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BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

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ATTORNEYS FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

The present suit grew out of a transaction which occurred between the parties to the record in Lincoln, Nebraska, December 31, 1896, in which the plaintiff in error, The Northern Assurance Company of London, herein called the assurance company, issued to the defendant in error, The Grand View Building Association,

herein called the building association, its written policy of insurance of the date aforesaid for the term of two years from such date, indemnifying the assured in the sum of $2,500 against loss or damage by fire on certain household and kitchen furniture and other articles of personal property of the value of $4,140, located in a certain building in Lincoln, Nebraska, and occupied as a boys' military and boarding academy. The stipulated premium rate for this insurance was $33.75, which was duly paid at the time the policy was issued. Among the provisions of the policy were the following:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

Also:

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Also:

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing require-

ments, nor unless commenced within twelve months next after the fire."

(Printed record, p. 62.)

On the day the policy was issued the property in question was already insured against loss or damage by fire in the sum of $1,500 under a policy theretofore issued to the building association by the Fireman's Fund Insurance Company of California, and was in force on the first day of June, 1898, when the property was totally destroyed by fire.

About the 26th day of July, 1898, the building association rendered to the assurance company a statement giving the particulars of the fire and of the loss thereby sustained. When the assurance company received the statement it first learned of the existence of the insurance policy issued by the Fireman's Fund Insurance Company (120), and on the 4th day of August following, it denied all liability under the provisions of its policy on account of the loss, and tendered to the building association the return of the $33.75 it received as the premium therefor.

On the 29th day of September, 1898, the building association commenced a suit against the assurance company in the district court of Lancaster county, Nebraska, to recover the sum of $2,500 on account of its loss. Subsequently the suit was removed to the circuit court of the United States for the district of Nebraska and prosecuted to a final judgment. In its petition (39), the building association alleged among other things:

"2. On the 31st day of December, 1896, plaintiff was the owner of certain household and kitchen furniture and other articles of personal property hereafter described, situate in the three-story brick and stone building with slate roof on lot "F," in Grand View Residence Park addition in Lancaster county, Nebraska, occupied as a boys' military and boarding academy, which said personal property was of the value of $5,722.49.

On said December 31st, 1896, the defendant in consideration of the

sum of $33.75 to it then paid by plaintiff as an insurance premium made and delivered to the plaintiff a policy of insurance on said property, a true copy whereof is hereto attached and made a part of this petition marked "Exhibit A," by the terms whereof defendant insured plaintiff for the term of two years from the 31st day of December, 1896, at noon to the 31st day of December, 1898, at noon, against all direct loss or damage by fire to an amount not exceeding twenty-five hundred ($2,500) dollars to all of the aforesaid property while so located, which said property was in said policy referred to and described in the words following:

'Nothing on the three-story brick and stone building with slate roof and its additions including foundations and all fixtures and attachments of every description belonging to said building while occupied for dwelling purposes only, situated on lot F, in Grand View Residence Park addition (referring to an addition to the city of Lincoln in Lancaster county, Nebraska), occupied as a boys' military and boarding academy.

'$2,500.00 on household and kitchen furniture of every description, useful or ornamental, bedding, family wearing apparel, watches and jewelry in use, plate and plated ware, musical instruments, sewing machine, printed books and music, pictures, paintings, engravings and mirrors and their frames (at not exceeding cost), amateur photographic outfit, billiard tables, trunks, garden tools and implements, screens, fuel and family stores, all while contained in the above-described building.

3. On the first day of June, 1898, during the term of said insurance and while said policy was in full force the aforesaid property of plaintiff covered by said insurance was burned and wholly destroyed by fire; and such fire was not caused by any act or neglect of plaintiff.

4. Plaintiff shortly prior to issuance of the aforesaid policy by defendant had procured a policy of insurance from the Fireman's Fund Insurance Company, incorporated under the laws

of California, insuring it against loss by fire, of the same property in the sum of $1,500 for a term of two years, which insurance was then subsisting and remained in force to and including the date of said fire.

The fact of said subsisting insurance in said company was by H. J. Walsh, plaintiff's president, disclosed to defendant at and prior to the execution and delivery of its said policy and prior to payment by plaintiff of said premium therefor and was so by him orally disclosed and communicated to defendant's recording agent at Lincoln, Nebraska, A. D. Borgelt, who then had full authority from defendant to countersign and issue its policies and accept fire-insurance risks in its behalf and collect and receive premium therefor and who in fact accepted said risk and issued said policy, and collected and received said premium as such agent in behalf of defendant with knowledge beforehand of said concurrent insurance and with the intent knowingly to waive the condition of said policy that 'it shall be void if the insured now has or shall hereafter make or procure any other contract of insurance' on the property covered thereby. And by the aforesaid several acts and by procuring, receiving, accepting and retaining of said insurance premium with knowledge of said subsisting concurrent insurance the defendant has waived the said condition and is estopped to claim benefit thereof and is bound by said policy notwithstanding said condition. Plaintiff had no insurance on said property except as before stated.

5. On or about the 26th day of July, 1898, within sixty days from date of said fire, the plaintiff rendered and delivered to defendant a statement signed and sworn to by its president giving all the particulars of said fire, and of its loss and damage thereby sustained by the terms of said policy required which the defendant accepted and still retains; and plaintiff on its part has complied with all the conditions of said policy.

6. The plaintiff was owner of said property when so destroyed by fire and the same was then of the value of $5,722.49 and a

chedule of the items thereof is hereto attached marked 'Exhibit B' and made a part of this petition.

7. On the 26th day of July, 1898, the plaintiff demanded of defendant the payment of said insurance; and defendant disregarding its undertaking in that behalf denies liability on the sole ground that said policy has been void from the date of its issue by reason of the said provision in regard to other insurance, the same provision which as aforesaid it had waived at time of issuing its said policy.

8. No part of said insurance has been paid and there is now due and payable thereon from defendant to plaintiff the sum of two thousand five hundred ($2,500) dollars with interest thereon from the 26th day of July, 1898. Wherefore plaintiff prays judgment against defendant for the sum of two thousand five hundred ($2,500) dollars, with interest thereon from the 26th day of July, A. D. 1898, and costs of suit."

In its answer (48), the assurance company admitted the ownership of the property described in the petition, on the date and in the manner therein alleged; also that the property was burned as charged, but denied that the policy was in full force at the time.

It admitted that the building association forwarded to the assurance company the proofs of loss, the receipt of which was acknowledged with the statement that they would be held subject to the order of the building association.

It admitted that the building association owned the property at the time it was burned.

It denied the allegations contained in the seventh and eighth paragraphs of the petition aforesaid.

It further answered as follows:

"This defendant alleges that the policy of insurance which it issued to the plaintiff on December 31, 1896, contained the following provision:

'This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the

insured now has or shall hereafter make or procure and other contract of insurance whether valid or not, on property covered in whole or in part by this policy.'

The defendant further says that its policy in question was issued to the plaintiff with the express statement therein made that it was issued 'in consideration of the stipulations' therein named and of a certain amount of premium paid therefor. And said policy, besides the provisions above quoted, contains the following stipulation and condition:

'This policy is made and accepted subject to the foregoing stipulations and conditions together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.'

This defendant says that notwithstanding the stipulations, provisions and agreements above set forth and without the consent of the defendant endorsed upon said policy in writing and without the knowledge of the defendant, the plaintiff obtained a policy of insurance upon the property covered by the policy issued by this defendant in the sum of $1,500 in the Fireman's Fund Insurance Company.

Defendant says that the property upon which it issued its policy in the sum of $2,500 was represented by the plaintiff to the defendant to be of the value of $3,500.

The defendant alleges that by reason of the additional insurance upon said property not consented to in writing endorsed upon the policy of defendant and not in fact known to the defendant,

the policy written by the defendant upon the plaintiff's property was at the date of the fire which damaged or destroyed the plaintiff's property wholly void, and was and has been void from the date of such additional insurance.

Defendant further says that on the 5th day of August, 1898, the defendant tendered to the plaintiff in current funds the sum of $33.75, the amount of the premium paid by the plaintiff upon the policy in question, and now brings into court and tenders to the plaintiff the said sum of $33.75 with interest at the rate of 7 per cent from Dec. 31st, 1896.

Wherefore, this defendant prays that judgment may be rendered against it for said sum of $33.75 with interest from Dec. 31st, 1896, with the costs of suit up to the filing of this answer, and no more."

The building association thereupon filed its reply (53), as follows:

"The plaintiff for reply to the answer of defendant herein denies that it procured a policy of insurance in the Fireman's Fund Insurance Company upon the property insured by defendant in violation of the terms of the policy issued by defendant to plaintiff and without the knowledge of defendant; and alleges that the amount of insurance carried on said property by plaintiff was not in any manner increased after issuing of defendant's policy, or during the term of insurance under defendant's policy. The policy referred to in said answer, of $1,500 in the Fireman's Fund Insurance Company, was, on the contrary, subsisting at and prior to the issuance by defendant to plaintiff of the policy sued on herein, and was in fact issued December 12, 1895, for the term of three years, and the existence of such policy, on the same property covered by defendant's policy, was personally well known to A. D. Borgelt, defendant's recording agent, who wrote said policy and accepted said risk, and who then had full charge of defendant's agency at Lincoln, Nebraska, with authority to accept fire-insurance risks for and on defendant's behalf, to countersign and issue its policies of insurance, and to collect and receive the premiums

therefor. And at and prior to his acceptance of said risk and issuance of the policy sued on, the plaintiff's president, H. J. Walsh, reported orally to said A. D. Borgelt the fact of such subsisting insurance of $1,500.00; and said Borgelt as such agent, with full knowledge of said fact, accepted the risk and wrote, executed and delivered said policy to defendant, with the intent on the part of both plaintiff and defendant that the same should be concurrent with the said subsisting insurance and not avoided or affected thereby, and with purpose and intent of defendant knowingly to waive and forego all benefit of the provisions of said policy set forth in the defendant's answer; and in faith thereof and with the sole purpose to procure such insurance to be concurrent with the said subsisting insurance, and not otherwise, the plaintiff paid, and the defendant procured and received the premium therefor. By all the aforesaid several acts, the defendant has waived all benefit of the particular conditions of its policy prohibiting concurrent insurance, prior and subsequent, except by indorsement on the policy; and defendant is estopped and concluded thereby from claiming any benefit or advantage by reason of said conditions of the policy.

Plaintiff denies that it ever represented to defendant that the property described in and insured by said policy of insurance was of the value of $3,500.00.

Wherefore plaintiff prays for judgment as in its petition prayed."

The only question presented under the pleadings aforesaid important to notice for the purposes of the present suit, was whether an insurance company should be permitted to take advantage of a condition contained in one of its policies to avoid the payment of a loss sustained thereunder, when it appears that the fact rendering the policy void, by the terms of the condition pleaded as a defense, was an existent fact known to the insurer at the time it issued its policy and accepted the premium which, for that reason, rendered the policy void, if at all, from the moment it was delivered.

On the 20th day of December, 1898, the cause was duly tried,

and from the evidence the trial judge instructed the jury to find upon the following questions (56):

"Finding 1. Did the defendant issue to plaintiff the policy of fire insurance mentioned and described in plaintiff's petition? Answer. Yes.

Finding 2. Was the property covered by said policy of insurance burned on or about June 1, 1898? Answer. Yes.

Finding 3. Did the plaintiff on or about July 26th, 1898, furnish the defendant with proofs of the loss of said property by fire? Answer. Yes.

Finding 4. Did the policy issued to the plaintiff by the defendant contain the following provisions?

'This entire policy unless otherwise provided by agreement endorsed hereon or added hereto shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy.'

And did said policy also contain the following provision?

'This policy is made and accepted subject to the foregoing stipulations and conditions together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions, no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver if any shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.' Answer. Yes.

Finding 5. Was there at the time of the issuance of the policy in suit, other insurance upon the insured property in the sum of

$1,500 in the Fireman's Fund Insurance Company? Answer. Yes.

Finding 6. Was A. D. Borgelt the agent of the defendant company to issue policies of insurance and how are his powers defined, and did he issue the policy in question as such agent? Answer. A. D. Borgelt was recording agent of the Northern Assurance Company at Lincoln, Nebraska, with authority from defendant to countersign and issue its policies and accept fire-insurance risks in its behalf, and collect and receive premiums therefor, and issued the policy sued on as such agent.

Finding 7. Did A. D. Borgelt know when the policy in the defendant company was issued and delivered to plaintiff that there was then $1,500 subsisting insurance in the Fireman's Fund Insurance Company upon the property covered thereby, issued prior to the date of the policy of the defendant company, and was such knowledge communicated to said Borgelt by or on behalf of the assured? Answer. Yes.

Finding 8. What was the actual cash value of the property covered by the policy in suit which was destroyed by fire June 1, 1898? Answer. ($4,140.00) four thousand one hundred forty dollars.

Finding 9. Was consent to concurrent insurance of $1,500 endorsed on the policy in suit? Answer. No.

Finding 10. Did defendant tender a return of the premium paid upon the policy in suit? If so, when and what amount? Answer. Yes; on August 4, 1898, in the sum of $33.75, being the amount of the premium paid for the policy, and the same was not accepted by plaintiff.

Finding 11. Did the policy sued on contain the following provision:

'This company shall not be liable under this policy for a greater proportion of any loss on the described property or for loss by and expense of removal from premises endangered by fire than the amount hereby insured shall bear to the whole insurance? Answer. Yes.

Finding 12. What was the whole amount of insurance on said property at the time of the loss? Answer. $4,000.00."

Afterwards on the 22nd day of December, 1898, the plaintiff filed a motion for judgment on the verdict (58), as follows:

"1. Plaintiff moves the court for judgment herein in its favor against defendant for the sum of $2,500.00, and interest thereon from commencement of suit, August 30, 1898, and costs, because the facts found by the jury conclusively establish plaintiff's right to recover of defendant the full sum prayed for in the petition.

2. Defendant, by issuing its policy and receiving the premium therefor, with knowledge of the existing insurance of fifteen hundred dollars ($1,500) in Fireman's Fund Insurance Company, communicated beforehand by assured to A. D. Borgelt, its recording agent, who issued the policy, as by the jury specially found, waived the conditions of said policy set forth in the answer, and is estopped thereby to claim a forfeiture or assert the invalidity of said policy by virtue of said conditions."

On the same day the defendant moved for judgment on the findings as follows:

"Comes now the defendant and moves the court to render judgment in favor of defendant upon the findings of the jury returned herein."

Thereupon, after due consideration, the court ordered (59), that the defendant's motion should be overruled and denied, and that the plaintiff's motion for judgment should be sustained, and it was thereupon considered, ordered and adjudged by the court that the plaintiff have and recover of the defendant the sum of $2,500 with interest thereon at seven per cent (7 per cent) per annum from September 26, 1898, besides its costs and disbursements taxed in the sum of forty-five and 75-100 dollars ($45.75).

The defendant thereupon carried the case to the United States circuit court of appeals for the eighth judicial circuit where the

judgment of the trial court was affirmed by a divided court. 101 Fed., 77.

Afterwards upon the application of the defendant the case was brought to the supreme court of the United States upon a writ of certiorari, where such proceedings were had as resulted in the reversal of the judgment rendered by the trial court and sustained by the circuit court of appeals. 183 U. S., 308.

Afterwards at the May term of the United States circuit court for the district of Nebraska, held at Omaha, Nebraska, May 12, 1902, further proceedings were had before the Honorable William H. MUNGER, judge; that is to say, judgment was duly entered in the words and figures following (93):

"Now on this 12th day of May, 1902, this cause coming on to be further heard upon the motion of defendant for judgment in its favor on the special findings of the jury heretofore made herein, of which plaintiff has been given due notice, and the court being advised in the premises, and in pursuance to the mandate from the supreme court of the United States, it is now here

Ordered and adjudged that defendant have judgment against the plaintiff herein upon the special findings of the jury, no cause of action, and for its costs herein expended taxed at $———."

Sometime after the final judgment had been entered in the original case, to-wit, on the 21st of January, 1903, the building association instituted the present suit in the district court of Lancaster county, Nebraska, to reform the policy in controversy and to obtain a judgment upon the reformed policy for the sum of $2,000 with interest from the 26th day of July, 1898, for damages on account of the loss sustained by the fire. The prayer for reformation of the policy is based upon the facts stated in the following paragraphs of the petition (6):

"2. On the 31st day of December, 1896, plaintiff was owner of certain household and kitchen furniture and other articles of personal property, situate in the three-story brick and stone building, with slate roof, on lot F, in Grand View Residence Park addition in Lancaster county, Nebraska, occupied as a boys' military and boarding academy, which said personal property was of the value of more than $4,000. The said property on said day was insured against loss or damage by fire in the sum of $1,500 only, under a policy theretofore procured by plaintiff and issued by the Fireman's Fund Insurance Company, incorporated under the laws of California, which insurance was then subsisting and remained in force to and including the date of the destruction of said goods by fire, as heretofore alleged.

On said December 31, 1896, the plaintiff applied to the defendant for further and additional insurance in the sum of $2,500 upon said personal property to be concurrent with the aforesaid insurance underwritten by the Fireman's Fund Insurance Company, and then and there informed defendant of the said subsisting insurance of $1,500 in said Fireman's Fund Insurance Company theretofore written by plaintiff thereon.

Said application was made orally by plaintiff's president, H. J. Walsh, and the defendant, by its duly authorized agent, A. D. Borgelt, accepted such application for said insurance of $2,500 to be additional and concurrent with the subsisting insurance of $1,500 aforesaid and for a term of two years and for a premium rate then and there agreed upon between plaintiff and defendant of $33.75. Plaintiff duly paid to the defendant the sum of $33.75 for the premium so agreed upon for said insurance of $2,500 for the term of two years, and thereupon, and in consideration of the payment of such premium, the defendant made and delivered to plaintiff a policy of insurance on said property a true copy whereof is hereto attached and made a part of this petition, marked Exhibit A, by the terms whereof defendant insured plaintiff for the term of two years from the 31st day of December, 1896, at noon, to the 31st day of Decem-

ber, 1898, at noon, against all direct loss or damage by fire, to an amount not exceeding $2,500, to all of the aforesaid property, while so located, said property was in said policy referred to and described in the words following:

'Nothing on the three-story brick and stone building with slate roof, and its additions, including foundations and all fixtures and attachments of every description belonging to said building while occupied for dwelling purposes only, situated on Lot F in Grand View Residence Park addition (referring to an addition to the city of Lincoln, in Lancaster county, Nebraska,) occupied as a boys' military and boarding academy.

'$2,500 on household and kitchen furniture of every description, useful or ornamental, bedding, family wearing apparel, watches and jewelry in use, plate and plated ware, musical instruments, sewing machine, printed books and music, pictures, paintings, engravings and mirrors and their frames, (at not exceeding cost), amateur photographic outfit, billiard tables, trunks, garden tools and implements, screens, fuel and family stores, all while contained in the above described building.'

* * * * * * * * * * * *

5. The plaintiff was owner of said property when so destroyed by fire, and the same was then of the value of more than $4,000.

* * * * * * * * * * * *

7. Notwithstanding the premises, and that it was the intention of both plaintiff and defendant that said policy should by its terms permit the plaintiff to carry concurrent insurance in the sum of $1,500, the said policy in the form so executed and delivered, by mistake both of plaintiff and defendant, failed to provide for the carrying of concurrent insurance and the plaintiff accepted the same and retained said policy without discovering said omission and error, until after the loss of the said property by fire, plaintiff further says in the alternative that it should be found there was no such mistake on defendant's part and that the policy, as issued, was in the form by it in-

tended, then and in such case the omission to so provide for concurrent insurance was wholly through mistake and inadvertance on the part of the plaintiff, and by fraud practiced on the part of the defendant, in that the defendant's said agent Borgelt had knowledge beforehand of the existence of said $1,500 insurance, and that the application for said insurance was made with intention that the defendant's policy of $2,500 should be concurrent therewith and in addition thereto, and said agent, with knowledge of said fact, which was duly reported to him by the plaintiff, accepted the said insurance premium of $33.75 and delivered said policy, knowing that the plaintiff and defendant had agreed that the said insurance should be additional and was intended by the plaintiff to be concurrent with the other insurance mentioned, and not otherwise, and by reason of the premises and accepting and retaining of said insurance premium by said agent, with knowledge of said insurance so previously written, and the acceptance of the risk thereon and the issuing and delivering of said policy, with full knowledge thereof, and with knowledge that plaintiff had ordered and purchased the said policy to be concurrent with said former insurance and of the plaintiff's acceptance of said policy in faith thereof, the defendant is estopped and concluded to deny that said policy was intended to bear an indorsement signed by said agent, permitting the plaintiff to carry additional concurrent insurance in the sum of $1,500.

8. By reason of the aforesaid error and mistake, whereby the said written policy failed to express the contract of the parties, the plaintiff is and has been since the date of said loss, unable to enforce said policy, because of a condition contained in the printed portion thereof in the words following:

'This entire 'policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void, if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy.' And plaintiff is without any remedy at law and is remediless except by the

intervention of the court of equity to correct and reform said written policy by its decree, by adding thereto, in compliance with said stipulation for an agreement to be endorsed thereon or added thereto in accordance with the agreement actually made between plaintiff and defendant, the words following: 'Consent is hereby given to additional insurance in the sum of $1,500 to be concurrent herewith.'

9. Plaintiff says that by reason of all the premises, there became due to it upon said contract, by reason of the loss of said property, as before stated, upon the 26th day of July, 1898, the sum of $2,000, and the said sum, with interest thereon from said July 26, 1898, is now due and payable from defendant to plaintiff. Plaintiff expressly remits and releases any and all claim against defendant on account of the premises in excess of the said principal sum of $2,000. Said sum is wholly unpaid.

The plaintiff, therefore, prays that said insurance policy may be reformed as aforesaid and that upon such reformation the plaintiff have judgment thereon for the sum of $2,000, together with interest thereon from the 26th day of July, 1898, the damages so by it sustained, and for costs of suit.."

On the 6th of July, 1903, the assurance company filed its answer (14), from which, for the purposes of the present controversy, we quote the following paragraphs:

"II. Defendant admits that on the 31st day of December, 1896, the plaintiff owned the property mentioned in paragraph two of plaintiff's petition and that it was of the value therein alleged and that it was on that day already insured in the sum of fifteen hundred dollars under a policy theretofore procured by plaintiff and issued by the Fireman's Fund Insurance Company. Defendant also admits that on said date the plaintiff applied to defendant for a policy of insurance in defendant company and defendant issued to plaintiff its certain policy in the sum of $2,500 covering the property described in said paragraph two of plaintiff's petition for the term of two years from said 31st day of December, 1896, at noon.

Defendant avers that its said policy contains the following provision:

'This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy.'

And its said policy also contained the following stipulation and condition:

'This policy is made and accepted subject to the foregoing stipul .tions and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.'

III. Defendant avers that it had no knowledge at the time it issued its said policy that there was any other insurance upon the property covered thereby and avers that no consent to such other insurance was endorsed upon its policy or added or attached thereto. Defendant avers that its said policy never in fact took effect because of such other insurance not known to it and not consented to by written endorsement thereupon.

IV. Defendant avers that it did not know that there was other insurance upon said property covered by the said policy until after said property had been destroyed by fire and that upon receipt of such information, it immediately and on August 4, 1898, tendered to plaintiff the premium upon said policy in the sum of $33.75, which the plaintiff then refused to take.

V. The defendant denies that its agent at the time of the making and delivery of its said policy knew that there was then in existence another policy of insurance in the Fireman's Fund Insurance Company for the sum of fifteen hundred dollars upon the property covered by the defendant's policy and this defendant denies specifically that there was any mistake between the plaintiff and defendant as to the terms of defendant's policy; and defendant avers that the policy delivered by defendant's agent, in fact recited the terms of the contract made by and between the plaintiff and defendant; and defendant denies that there was any fraud practiced either by it or its agent whereby there was omitted from said policy consent by defendant to the other insurance already subsisting upon said property.

VI. Defendant specifically denies liability upon its said policy and avers that said contract never in fact took effect and was void by its terms from its inception because of the fact that there was then other insurance on the property covered thereby not consented to in writing endorsed thereon or attached thereto, as required by the terms of said policy. Defendant renews its tender of the premium paid upon said policy and brings into court the said sum of $33.75 for the use of the plaintiff, not waiving its plea in abatement stated in paragraph XI hereof.

VII. The policy issued by defendant to plaintiff contained the following provision:

'No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.'

The defendant shows that the plaintiff claims in its petition herein that the property covered by said policy of insurance was burned and wholly destroyed by fire on June 1st, 1898. The petition in this cause was filed January 21, 1903, and this action is barred by the terms of said policy.

VIII. Defendant further shows that this action, which is brought to secure a reformation of the said policy of insurance because of the mutual mistake of the parties, or the fraud of defendant, so that same shall recite consent to the previous insurance on the property, was commenced January 21, 1903, that the policy was delivered to plaintiff on the day of its date, December 31, 1896, and that said plaintiff and its officers have had said policy in their possession continuously from that time and the plaintiff and its officers could have discovered by an inspection of said policy upon the date of its delivery to plaintiff that said policy did not contain the agreement for, and consent to, other insurance which plaintiff now says should have been endorsed thereon, and the plaintiff's present cause of action then accrued and defendant says that this action is barred by sections 5 and 10 of the Code of Civil Procedure of Nebraska, which read as follows:

'Sec. 5. Civil actions can only be commenced within the time prescribed in this title after the cause of action shall have accrued.'

'Sec. 10. Within five years, an action upon a specialty, or any agreement, contract, or promise in writing or foreign judgment.'

IX. Plaintiff further avers that on September 29, 1898, the plaintiff brought an action in this court and against this defendant to recover against the defendant the sum of twenty-five hundred dollars upon the identical policy involved in this suit. The petition therein contained the specific allegation that the fact of the other insurance upon the property covered by defendant's policy was communicated to defendant's recording agent at Lincoln, but the petition in said former suit, which is on file in this court, avers that defendant's agent "in fact accepted said risk and issued said policy and collected and received said premium as such agent in behalf of defendant with knowledge beforehand of said concurrent insurance and with the intent knowingly to waive the condition of said policy that, 'it shall be void if the insured now has or shall hereafter make or

procure any other contract of insurance' on the property covered thereby. And by the aforesaid several acts and by procuring, receiving, accepting and retaining of said insurance premium with knowledge of said subsisting concurrent insurance the defendant has waived the said condition and is estopped to claim benefit thereof, and is bound by its said policy notwithstanding said condition."

In its answer in said suit this defendant denied liability upon the ground that no consent to the other insurance was endorsed upon its policy and relied upon the conditions of its policy which are set forth in paragraph II of this answer, and denied that either it or its agent knew of the fact of said other insurance until after the fire. Said action was removed by this defendant, upon the ground of the diverse citizenship of the parties, to the circuit court of the United States for the district of Nebraska, in which court the plaintiff filed a reply to the answer of defendant in which it is again averred that the existence of the policy of fifteen hundred dollars in the Fireman's Fund Insurance Company was known to defendant's agent and that said agent 'with full knowledge of said fact, accepted the risk and wrote, executed and delivered said policy to defendant, with the intent on the part of both plaintiff and defendant that the same should be concurrent with the said subsisting insurance and not avoided or affected thereby, and with purpose and intent of defendant knowingly to waive and forego all benefit of the provisions of said policy set forth in the defendant's answer.'

Said cause proceeded to trial in said circuit court of the United States for the district of Nebraska, was taken from there to the United States circuit court of appeals for the eighth circuit and from the latter court removed to the supreme court of the United States by writ of certiorari, which latter court held that the defendant was not liable upon this policy; that it had the right to protect itself against over-insurance by the provisions herein referred to in said paragraph II of this answer, and that said contract could not be changed or altered by parol

testimony and that admitting the knowledge of defendant's agent when he delivered the policy in suit of the pre-existing insurance, the defendant had not thereby waived the said provisions of its contract; and the supreme court of the United States reversed the decision of the United States circuit court of appeals for the eighth circuit and the United States circuit court for the district of Nebraska and directed the said circuit court, where said cause was tried, to enter a judgment in favor of defendant at plaintiff's cost, which was done; the right of the plaintiff to recover from defendant upon the policy involved in this action because no consent to other insurance was endorsed upon said policy, was adjudicated against the plaintiff, and the defendant pleads said adjudication in bar of this action.

The decision of the supreme court of the United States is reported under the title *'Northern Assurance Company of London v. Grand View Building Association,'* 183 U. S., 308, and is also found under the same title in volume 22 of the Supreme Court Reporter at page 133.

X. The defendant avers that long prior to the time when the plaintiff instituted the suit upon the policy as written and delivered, the suit being the one described in the preceding paragraph of this answer, and long before the fire which destroyed the plaintiff's property, the plaintiff having possession of the policy became and was fully advised of the terms and conditions thereof and particularly that the defendant did not therein consent to other insurance upon the property therein described by writing endorsed thereon or attached thereto.

And this defendant says that after the plaintiff had become fully informed of all the terms and conditions expressed in the policy, and particularly of the terms and conditions with respect to other insurance, it neglected and refused to make any demand whatsoever upon the defendant to have the policy changed to conform to the alleged understanding set out in this petition herein and refused to bring any suit to have the same reformed in accordance with said alleged misunderstanding; but on the contrary the said plaintiff with full knowledge

of such terms and conditions, and particularly with respect to other insurance, elected to stand upon the policy as written and delivered and to waive the right to have the policy changed in accordance with its alleged understanding of the agreement and thereupon instituted the suit referred to upon the policy as written and delivered, and prosecuted the same to a final determination in the supreme court of the United States, thereby causing the defendant great trouble, annoyance, cost and expense amounting to more than two thousand dollars, and this defendant alleges that the plaintiff, by its said election and conduct thereby ratified the terms and conditions of the policy as written and delivered and that the said plaintiff is estopped from asserting any claim or right whatever by virtue of the pretended agreement or understanding described in the petition herein.

XI. The defendant further avers that in the litigation set forth in paragraph IX of this answer, which this defendant avers involved the subject matter of the present suit, the defendant incurred large costs and expenses and recovered a large judgment against the plaintiff for costs in the sum of $400.88 which the plaintiff refuses to pay, although, as defendant is informed and believes and charges the fact to be, plaintiff could pay if it would. The defendant, not intending hereby to waive any of its defenses to the present suit hereinbefore set out or its plea in bar by the former adjudication between the parties, pleads the non-payment of the costs of said other litigation between the parties hereto concerning the subject matter of the present suit, in abatement of the present action.

Defendant further shows that this action, which is brought to secure the reformation of the said policy of insurance because of the mutual mistake of the parties or the fraud of defendant so that same shall recite consent to the previous insurance on the property, was commenced January 21, 1903, plaintiff's said cause of action, if any it has, accrued on the day of the date of the policy, to-wit, December 31, 1896, at which time plaintiff and its officers had an opportunity and could have

discovered by an inspection of said policy that it did not contain the agreement for a consent to other insurance which plaintiff now says should have been endorsed thereon; but defendant avers that the plaintiff's cause of action, if any it has, accrued at the very latest and at all events on or about August 4, 1898, at which time plaintiff was informed that said policy did not contain the agreement now sought to be added thereto, by the receipt of a letter from the defendant dated August 2, 1898, in which defendant denied liability to plaintiff on said policy because no agreement for concurrent insurance was contained therein, and this action is barred under section 12 of the Code of Civil Procedure of Nebraska, which is as follows:

'Within four years, an action for trespass upon real property; an action for taking, detaining, or injuring personal property, including actions for the specific recovery of personal property; an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated; an action for relief on the ground of fraud, but the cause of action in such case shall not (be) deemed to have accrued until the discovery of the fraud.'

Wherefore defendant, having fully answered, prays that this suit be abated and proceed no further until the plaintiff shall pay the costs of the former litigation between the parties in the sum of $400.88 and that upon the trial of this cause defendance be hence dismissed, without day with its costs."

On the 11th day of September, 1903, the building association filed its reply (20), in which it alleged, among other things:

"1. Plaintiff admits that the policy mentioned in the petition contained, among other things, the provisions quoted in paragraph II of the said answer, and plaintiff alleges that because of said provisions, notwithstanding the omission of said policy to state in writing the permission for concurrent insurance which was, in fact, contracted for as in the petition alleged, plaintiff is without remedy at law.

2. For reply to paragraph III of said answer, plaintiff admits that no consent to other insurance was endorsed upon the policy

referred to in said answer and in the petition, but alleges that the failure to so indorse such consent, in conformity to the agreement as alleged in the petition, was due to mistake or fraud upon the part of the defendant and defendant's agent, as is fully alleged in the petition. And for further reply to said paragraph III of the answer, the plaintiff denies each and every allegation therein contained.

* * * * * * * * * * * * *

6. For reply to paragraph VII of said answer, the plaintiff says: First, That the facts stated in said paragraph of the answer and pleaded therein as a separate defense are not sufficient to constitute a defense to plaintiff's petition, and that the provision therein set forth is repugnant to the laws and the policy of this state, and in contravention of the statute of limitation providing that a suit upon a contract in writing may be brought within five years from the date when the cause of action thereon accrues. Second, Plaintiff for further reply to said paragraph and said separate defense says that by reason of the mistake and fault and neglect of the defendant in failing to provide in and by said policy consent for the writing of concurrent insurance, the policy was erroneously and fraudulently so drawn as to prevent the maintenance of an action at law thereon, and that plaintiff, being without remedy at law, is obliged to resort to this suit in equity to compel the execution of the contract actually made by reforming said instrument.

7. For reply to paragraph VIII and to paragraph 8½ added by amendment and to the separate defenses therein pleaded by said answer, this defendant says: First, That the facts set forth in said paragraph are not sufficient to constitute a defense to plaintiff's petition. Second, Plaintiff for a further reply to said defense alleges that the fire occasioning the loss by plaintiff mentioned in its petition, did not occur until on or about the first day of June, 1898, and that five years thereafter had not elapsed when this action was brought; that by the statute of limitation, section 10, mentioned in said answer, plaintiff's right to sue and maintain his action upon said pol-

icy would have subsisted at law for the period of five years from said June 1, 1898, and that the right to equitable relief by reformation, made necessary because of defendant's mistake, neglect or fraud, as alleged in the petition, subsisted so long as the legal remedy would have subsisted if said writing had been so drawn as to express the true contract between the parties.

8. For its reply to paragraph IX of said answer plaintiff says that the action therein mentioned and referred to was a suit at law, in which no equitable remedy was invoked, and that the court of law wherein said cause was tried was without power in said action to grant any equitable relief. Plaintiff further says that in the said cause all questions of fact in issue were found in favor of this plaintiff and against the defendant. It was found and determined in said cause that the fact of subsisting insurance at the time defendant's policy was written, was known to the recording agent of the defendant, A. D. Borgelt, and had been reported to said Borgelt by plaintiff prior to the issuance of said policy, and that said Borgelt at the time issued said policy with knowledge of said concurrent insurance, and that he then had authority from defendant to countersign and issue its policy and accept fire insurance risks on its behalf, and collect and receive premiums therefor. It was further found as a matter of fact in said cause that the property so insured exceeded in amount the sum of $4,000, and relief was therein denied to plaintiff, notwithstanding the finding of all the facts in plaintiff's favor, solely upon the legal ground that the court of law was without power to grant relief except in accordance with the letter of said contract, and that a reformation of said policy was a condition precedent to plaintiff's right to enforce the same. Wherefore the plaintiff says that the court rendering the said judgment was without power to render the relief herein prayed for; that the relief herein sought is other and different relief from that sought in the action mentioned in said answer; and that the issues in respects aforesaid are not identical and that the judgment referred to

in said answer is not an adjudication of the cause of action set forth in plaintiff's behalf herein.

9. For reply to paragraph X of said answer, and to the separate defense set forth and pleaded therein, this plaintiff denies each and every allegation therein contained. For a further reply to said paragraph and defense, this plaintiff says that the suit alleged in said paragraph to have been prosecuted by this plaintiff to a final judgment in the supreme court of the United States was a suit at law, and was not a suit in equity; that in and by its petition in said suit, which was the same suit referred to in paragraph IX of said answer, there were no allegations or averments that were in any particular inconsistent with the allegations and averments set forth in the petition herein. On the contrary thereof, plaintiff in the suit aforesaid affirmatively alleged the failure of defendant to write upon such policy permission for concurrent insurance, and affirmatively alleged that the said policy was conditioned that it should be void if there be other insurance without consent therefor endorsed thereon in writing. And plaintiff further alleged the knowledge of the agent of defendant of said other insurance, which had been duly reported to said agent. And upon said facts, the plaintiff made no election to claim upon the policy as written and to waive his right to a reformation, but mistook his remedy merely in this: plaintiff alleged that by reason of the facts aforesaid the defendant had waived the said policy condition and was estopped to claim exemption from liability by reason thereof and that by reason of said estoppel, plaintiff could maintain his action upon said policy in a suit at law without first resorting to a court of equity to have the same reformed. Plaintiff alleges that its present action is in no wise inconsistent with any fact alleged in said petition at law, but that it was held in said action at law, that the redress which plaintiff sued for, by obtaining a mere judgment at law on said contract was not compatible with the facts which appeared in the petition itself, showing that the contract, as erroneously written by the defendant's agent was,

according to its letter, void until so reformed as to express the true intent and meaning of the parties thereto. Wherefore, by reason of the premises, the plaintiff says that it has not made any election to abide by the terms of the contract as the same was written; and upon the facts of this case as they exist, and as alleged in the petition of plaintiff in the suit mentioned in said answer and in its petition herein, there was no choice or election of the remedies open to plaintiff, and plaintiff's sole remedy was in a court of equity, and for the relief herein prayed, and it is not estopped or concluded thereby to claim the relief sued for in this action, which is entirely compatible with all of the averments of the petition in the suit mentioned in said answer. Plaintiff says that any costs incurred by defendant in said suit were due to defendant's failure to recognize and pay to plaintiff the amount of its loss and claim which in equity and good conscience it was obligated to pay, and all thereof were made and incurred by the inequitable and unconscionable conduct of said defendant in its endeavor to defeat the just and equitable claim of plaintiff.

10. For reply to paragraph XI of said answer, and to the plea in abatement therein set forth, this plaintiff says that prior to the filing of said answer, the defendant presented the same identical issue by a specific motion and plea in abatement, and procured adjudication thereon, and that judgment has already been entered herein upon said plea in favor of this plaintiff and against the defendant. Plaintiff further says that for the collection of the costs mentioned in said paragraph, the defendant has an adequate remedy at law by proceedings on execution upon its said judgment, and that, if payment of said judgment for costs prior to the enforcement of said policy should be imposed upon this plaintiff as an equitable condition of granting plaintiff relief then plaintiff desires and offers to abide the judgment of the court and to comply with such equitable terms as the court may impose.

Wherefore plaintiff prays as in its petition prayed."

It also denied each and every allegation contained in paragraphs four, five and six of the answer.

The cause was subsequently tried before the court upon the issues established by the pleadings and on the 9th day of November, 1903, the following order and decree was entered (25):

"This cause having been heretofore tried and submitted to the court upon the evidence adduced at the trial thereof, and the argument of counsel being had in the premises and the court being now advised, finds the following facts and conclusions of law based thereon:

1. The plaintiff is a corporation organized under the laws of Nebraska. The defendant is a corporation, incorporated under the laws of Great Britain and Ireland, with power to do a general fire insurance business in the state of Nebraska.

2. That on the 31st day of December, 1896, the plaintiff was the owner of certain personal property, consisting of household effects, situated in the three-story brick and stone building on lot F, Grand View Park addition, in Lancaster county, Nebraska, and used as a boys' military and boarding academy. That said personal property was of the value of $4,000 and upwards; that at the said last above mentioned date the said personal property so described was insured against loss or damage by fire in the sum of $1,500 issued by the Fireman's Fund Insurance Company, a corporation organized under the laws of California, and at which time said insurance was subsisting and in full force and effect up to and including the date of the destruction of said property by fire as hereinafter found.

3. That on the 31st day of December, 1896, plaintiff applied to defendant for further and additional insurance in the sum of $2,500 upon said property, that said defendant company had knowledge by and through its duly authorized agent of the insurance, to-wit: $1,500 thereon in the said Fireman's Fund Insurance Company, and that said defendant company accepted such application for said insurance of $2,500 with the under-

standing by and through its agent that said $2,500 insurance so written by the defendant was to be additional and concurrent with the subsisting $1,500 insurance aforesaid, and that thereupon the plaintiff paid to the defendant company through its agent the sum of $33.75 as a premium agreed upon for said insurance for the term of two years.

4. That thereupon, and in consideration of the payment of such premium the defendant company delivered to the plaintiff a policy of insurance upon said property, insuring the plaintiff for the term of two years from the 31st day of December, 1896, to the 31st day of December, 1898, against all loss or damage by fire of the personal property herein mentioned and described.

5. That said policy of insurance so issued by the defendant company to the plaintiff herein was delivered to the president of the said plaintiff company, who received the same and without examination placed the same in his safe without knowledge of the contents of said policy as to its terms herein expressly found and described.

6. That on or about the first day of June, 1898, and during the term of said insurance, and while said policy was in full force and effect, the said personal property of the plaintiff described herein was burned and wholly destroyed by fire.

7. That said policy was executed on the said defendant company's behalf by its agent in the city of Lincoln, A. D. Borgelt, who had authority from the defendant to accept fire insurance risks for and on defendant's behalf and to countersign and issue policies for insurance, to collect, receive and receipt for premiums, and to provide by endorsement upon or added to said policies for the consent of the defendant company to the writing and carrying of insurance thereon to each policy so issued by him should be concurrent.

8. That the said agent failed to provide for the concurrent insurance of $1,500 as herein described, upon said property, and by mistake failed to insert such provision in the policy by him issued.

but that it was the intention of the plaintiff and the defendant that said policy should,by its terms,permit the concurrent insurance of $1,500 of which the said defendant's agent had knowledge as is herein found. And that the plaintiff accepted the said policy and retained the same without discovering said omission and error until after the loss of said property by fire.

9. That on or about September 29th, 1898, the plaintiff commenced an action in this court and against the defendant company to recover the sum of $2,500 upon the policy upon which this action is based and described in the plaintiff's petition, and in said action the plaintiff alleged that the fact of the other insurance upon the property covered by the defendant's policy was communicated to the defendant's recording agent at Lincoln, and averred that the defendant's agent accepted said risk and issued said policy, and collected and received said premium as such agent in behalf of defendant, with knowledge beforehand of said concurrent insurance and with the intent to waive the condition of said policy that,

'It shall be void if the insured now has or shall hereafter make or procure any other contract of insurance on the property covered thereby, and by such acts, and by procuring, receiving, accepting and retaining such insurance premium with knowledge of said subsisting and concurrent insurance the defendant has waived said condition and is estopped to claim benefit thereof and is bound by said policy notwithstanding said condition.'

10. That said defendant company in answer to the said petition denied liability upon the ground that no consent to the other insurance was endorsed upon its policy, and relied upon the condition of the policy above quoted, and denied that either it or its agent knew of said other insurance until after the fire. That said action so first brought by the plaintiff was removed by the defendant, upon the ground of diverse citizenship, of the said parties, to the circuit court of the United States for the district of Nebraska, in which court the plaintiff filed a reply alleging substantially as set forth in its petition.

11. That said cause so removed proceeded to trial in said circuit court of the United States for the district of Nebraska; was taken from there to the United States circuit court of appeals for the eighth circuit, and from the latter court removed to the supreme court of the United States by writ of certiorari, which latter court held that the defendant was not liable upon said policy for the reason that it had the right to protect itself against over-insurance by the provisions herein quoted, and that the plaintiff was not entitled to recover in said action for the reason that the court of law, in which said action existed, was without power to grant relief except in accordance with the letter of said contract, that said action so pending in the circuit court of the United States, as herein described, was a suit at law and not in equity.

12. That for a long time prior to the commencement of the suit upon the policy as written and delivered, as found in the preceding finding, and long before the fire, which destroyed the plaintiff's property, the plaintiff had possession of the policy, as is herein found, and was fully advised of the terms and conditions thereof prior to the commencement of said suit, and that after such knowledge of the conditions was expressed in the policy, with respect to other insurance, the plaintiff made no demand whatsoever upon the defendant to have the policy changed to conform to such understanding as to concurrent insurance herein found, nor instituted any suit prior to the one at bar to have the said policy reformed in accordance with such understanding, but with knowledge of such terms and conditions commenced the suit upon the policy as written and delivered, as herein found, and prosecuted the same to a final determination in the supreme court of the United States.

13. That in the prosecution of such suit the defendant incurred large costs and expenses and recovered a judgment against the plaintiff for costs in the sum of about $500.00 and expended large sums of money in defending said action, to-wit: about $2,000.

14. That this action was commenced on the 21st day of January, 1903.

Upon the foregoing findings of fact the court bases the following conclusions of law:

1. The object of the present action, and the former action pending in the United States circuit court, as described herein and commenced by the plaintiff, was to recover upon the contract of insurance, and in the first suit, in said circuit court, the plaintiff did not predicate his right of recovery upon the exact terms of the written instrument, but sought to avoid the operation of the one condition described in the foregoing findings, of the written contract, by alleging that said insurance of defendant company was concurrent with the $1,500 insurance then existing in the Fireman's Fund Insurance Company. These intrinsic facts, however, so alleged by the plaintiff and not embodied in the contract, present an issue not cognizable in the court of law, and for that reason, and that alone, the plaintiff was denied the right to recover. In the opinion of this court, the action first commenced and prosecuted to a conclusion in the federal court was not a bar to the present action. The true test being that the two actions must be so utterly inconsistent that the choice of one necessarily operated to renounce the other. The remedy sought in the action at bar and the former proceedings are not repugnant to each other. They are not inconsistent. Plaintiff asked for something in the first instance that the court was powerless to grant, and under the pleadings, plaintiff cannot be construed to have elected to affirm the contract as originally written.

2. The ultimate end of the action at bar is to recover upon a contract in writing, the action is not barred, therefore, until after a period of five years.

3. That the plaintiff is entitled to the relief prayed for in its petition.

4. The contract described in plaintiff's petition is, therefore, reformed by the court, to conform to the facts, and plaintiff is entitled to judgment upon said contract against the defendant

company in the sum of $2,000, together with interest from the 26th day of July, 1898, and for costs.

To each and every finding of fact and conclusion of law defendant company duly excepts.

It is therefore considered, adjudged and decreed by the court that said policy of insurance issued by the defendant to the plaintiff and set forth in the petition herein, be, and the same hereby is reformed by adding thereto the following words:

'Consent is hereby given to additional insurance in the sum of $1,500.00 to be concurrent herewith.'

it is further considered and adjudged by the court that the said plaintiff Grand View Building Association, do have and recover of and from the defendant, The Northern Assurance Company, of London, the said sum of $2,000 with interest from the 26th day of July, 1898, amounting to this date to the sum of two thousand seven hundred and forty and 06-100 ($2,740.06) dollars, as above found due it, with interest thereon at the rate of 7 per cent per annum from this date until paid, together with the costs of this action, taxed at $————."

Defendant appealed the cause to the supreme court of the state of Nebraska, where it was finally heard and determined, the supreme court sustaining the order and decree of the trial court in favor of the plaintiff, upon the grounds stated in the syllabi of its opinion (128):

"1. The statute of limitations relative to actions on written contracts applies to a suit in equity to reform a policy of fire insurance so that it will express consent to concurrent insurance, and to recover on the instrument as so reformed.

2. A suit in equity to reform a policy of fire insurance so that it will express consent to concurrent insurance, and to recover on the instrument as so reformed, may be maintained after the termination of an unsuccessful action at law to recover on the unreformed contract.

3. Evidence examined and found to uphold the findings and judgment of the district court." 102 N. W., 246.

Afterwards on the 20th day of February, 1905, the building association filed in the Nebraska supreme court the following motion for a rehearing of the cause:

"Comes now appellant and moves the court to vacate its decision pursuant to the opinion filed herein on January 18th, 1905, and to grant a rehearing in this case for the following reasons:

I.

The defendant pleaded as a defense to this suit the following provision of its policy:

'No suit or action on this policy, for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements nor unless commenced within twelve months next after the fire.'

The insured property was burned June 1, 1898. The petition in this suit was filed January 21, 1903. Another suit between the same parties upon the identical cause of action involved herein was begun August 30th, 1898, and was terminated adversely to the Grand View Building Association by the judgment entered in the United States circuit court for the district of Nebraska on May 12, 1902.

Sections 5 and 10 of Title II, Code of Civil Procedure of Nebraska, are as follows:

'Sec. 5. Civil actions can only be commenced within the time prescribed in this title, after the cause of action shall have accrued.'

'Sec. 10. Within five years, an action upon a specialty, or any agreement, contract, or promise in writing, or foreign judgment.'

Your Honors have construed said sections to annul the above clause of the written contract between the parties to this suit which requires the assured to bring its action within twelve months

next after the fire; and said sections five and ten of Title II, Code of Civil Procedure of Nebraska, as thus construed by this court, impair the obligation of the contract between the parties hereto and violate section 10 article 1, Constitution of the United States.

II.

The defendant pleaded both sections 10 and 12, Title II, Code of Civil Procedure of Nebraska in defense of this suit. Section 10 referred to is the five year statute of limitations and section twelve is the four year statute, and is as follows:

'Sec. 12. Within four years * * * an action for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud.'

Your Honors say of that section and in this case that an attempt to take unfair advantage of a mutual mistake is constructive fraud that falls within the latter provision.

The five-year statute was pleaded upon the theory that the plaintiff was chargeable upon the receipt of its policy with knowledge of its terms and that it did not contain the stipulation which in this suit it seeks to have added thereto; and the four-year statute was pleaded on the theory that at all events plaintiff was advised of the omission of the alleged stipulation at the time it brought its former suit, which was more than four years prior to the commencement of this suit. Your Honors erred in applying the five-year statute of limitations and permitting it to protect the plaintiff in a suit brought more than four years but less than five years after the fire.

III.

The appellant in its answer herein pleaded in bar of this suit the judgment of the United States circuit court for the district of Nebraska entered May 12, 1902, in a suit between the parties hereto, upon the cause of action involved herein, which judgment was entered pursuant to the mandate of the supreme

court of the United States in *Northern Assurance Company v. Grand View Building Association*, 183 U. S., 308. Said judgment constitutes a conclusive adjudication between the parties to this suit upon the controversy involved herein. This court refused to give effect to said judgment of the United States circuit court for the district of Nebraska so entered pursuant to the mandate of the supreme court of the United States, as an adjudication between the parties upon the controversy herein, saying: 'We think that so far as this jurisdiction is concerned, whatever may be the law elsewhere, this court has conclusively answered this question in the negative.' Speaking of the opinion of the supreme court of the United States your honors characterize it as 'an adherence to the letter of an antiquated and wornout technical formality.'

This court, therefore, refused to follow the judgment of the supreme court of the United States because it does not agree with the principle upon which its decision was rendered; and in so doing violated section 2, article 3, of the Constitution of the United States conferring power upon the courts of the United States in controversies between citizens of different states and between citizens of states and citizens of a foreign country, and the act of Congress of March 30, 1887, as amended August 13, 1888; and also violated section 2 of article 6 of the Constitution which makes it and the laws of the United States made in pursuance thereof, the supreme law of the land.

The decision and judgment of this court will deprive the appellant of its property without due process of law and will deny to it the equal protection of the laws, contrary to the 14th amendment to the Constitution of the United States; in all of which the court griveously erred.

IV.

The judgment of this court is unsupported by the facts.

Wherefore appellant prays that upon the rehearing of this cause the judgment of the district court of Lancaster county, Nebraska, may be reversed and the suit dismissed." (134.)

On the 3d of May, 1905, following, the supreme court of the state of Nebraska entered the following order of record:

"This cause coming on to be heard upon motion of the appellant for a rehearing herein, was fully considered by the court and no error appearing in the judgment heretofore entered herein by this court, it is therefore considered, ordered and adjudged that said motion be, and the same hereby is overruled, and a rehearing herein refused and denied." (137.)

The building association as plaintiff in error brings the cause to this court to have the judgment of the state supreme court reversed upon the following

Specification of Errors.

I.

Because the supreme court of Nebraska erred in affirming the judgment of the district court of Lancaster county upon the issues herein in favor of the defendant in error in this: That the issues herein were fully and finally litigated and adjudged in favor of the plaintiff in error in a former action between the parties hereto in the case of *Grand View Building Association v. North-Assurance Company of London*, wherein judgment was duly rendered by the circuit court of the United States for the district of Nebraska, pursuant to the opinion and judgment of the supreme court of the United States in the case of *Northern Assurance Company of London v. Grand View Building Association*, reported in volume 183 of its reports at page 308 et seq., which said judgment of the circuit court of the United States was by the plaintiff in error herein pleaded in bar of the present suit and relied upon as a defense both in the district court and upon the subsequent hearing in the supreme court of the state, by which plea the plaintiff in error herein claimed the benefit and protection of the opinion and judgments of the United States courts aforesaid and which opinion and judgments the district court and the supreme court of the state refused to consider, and thereby denied the plaintiff in error

the benefit and protection thereof, in violation of section two, article three, and section two, article six, of the Constitution of the United States, and the acts of Congress made pursuant thereto, and section one, article fourteen, of the amendments to the Constitution of the United States.

II.

Because the supreme court herein denied to the plaintiff in error the benefit, advantage and protection of its judgment against the appellee upon the same issues as are involved herein, which was rendered by the circuit court of the United States for the district of Nebraska, pursuant to the opinion and judgment of the supreme court of the United States in the case of *Northern Assurance Company of London v. Grand View Building Association*, reported in volume 183 of its reports at page 308 et seq., which judgment of the circuit court of the United States for the district of Nebraska was duly pleaded herein by the plaintiff in error in bar of this suit, in violation of section two, article three, and section two, article six of the Constitution of the United States, and the acts of Congress made pursuant thereto, and section one, article fourteen of the amendments to the Constitution of the United States.

III.

Because the supreme court of Nebraska error in affirming the judgment of the district court of Lancaster county, Nebraska, herein for the reason that said Grand View Building Association was permitted in this suit in said district court of Lancaster county to relitigate under the guise of a different form of action the questions and matters already adjudicated between the parties to this suit and which were finally decided and adjudged by the supreme court of the United States in *Northern Assurance Company of London v. Grand View Building Association*, 183 U. S., 308 et seq., in violation of section two, article three, and section two, article six of the Constitution of the United States, and the acts of Congress made pursuant thereto, and section

one, article fourteen of the amendments to the Constitution of the United States.

IV.

Because the supreme court of the state of Nebraska in its opinion and judgment herein denied to the plaintiff in error the benefit and protection of its judgment previously rendered between the parties hereto upon the same issues by the circuit court of the United States for the district of Nebraska, pursuant to the opinion and judgment of the supreme court of the United States in the case of *Northern Assurance Company of London v. Grand View Building Association,* reported in volume 183 of its reports at page 308 et seq., in this: That in its opinion and judgment herein the supreme court of the state of Nebraska held and adjudged that the provisions of the written policy in controversy were not in full force and effect between the parties hereto at and before the fire described in the evidence, whereas the circuit court of the United States had previously held and adjudged in the manner aforesaid that the provisions of said policy were in full force and effect at the times aforesaid, and which opinion and judgments of the United States courts the plaintiff in error has duly pleaded in bar of the present suit. And which opinion and judgment of the supreme court of the state of Nebraska is in violation of section two, article three, and section two, article six of the Constitution of the United States, and the acts of Congress made pursuant thereto, and section one, article fourteen of the amendments to the Constitution of the United States.

V.

Because the supreme court of the state of Nebraska in its opinion and judgment herein denied to the plaintiff in error the benefit and protection of its judgment previously rendered between the parties hereto, upon the same issues, by the circuit court of the United States for the district of Nebraska, pursuant to the opinion and judgment of the supreme court of the

United States in the case of *Northern Assurance Company of London v. Grand View Building Association*, reported in volume 183 of its reports at page 308 et seq., in this: That in its opinion and judgment herein the supreme court of the state of Nebraska held and adjudged that the following provision contained in the written policy in controversy, to-wit:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the assured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy,"

was of no force and effect between the parties hereto at and before the fire described in the evidence, whereas the circuit court of the United States had previously held and adjudged in the manner aforesaid that the provision aforesaid was in full force and effect at the times aforesaid and which opinion and judgment of the United States courts the plaintiff in error has duly pleaded in bar of the present suit. And which opinion and judgment of the supreme court of the state of Nebraska is in violation of section two, article three, and section two, article six of the Constitution of the United States, and the acts of Congress made pursuant thereto, and section one, article fourteen of the amendments to the Constitution of the United States.

VI.

Because the supreme court of the state of Nebraska in its opinion and judgment herein denied to the plaintiff in error the benefit and protection of its judgment previously rendered between the parties hereto upon the same issues by the circuit court of the United States for the district of Nebraska, pursuant to the opinion and judgment of the supreme court of the United States in the case of *Northern Assurance Company of London v. Grand View Building Association*, reported in volume 183 of its reports at page 308 et seq., in this: That in its opinion and judgment herein the supreme court of the state of

Nebraska held and adjudged that the following provision of the written policy in controversy, to-wit:

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions, no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

was of no force and effect between the parties hereto at and before the fire described in the evidence, whereas the circuit court of the United States for the district of Nebraska had previously held and adjudged in the manner aforesaid that the provisions of said policy were of full force and effect at the times aforesaid and which opinion and judgments of the United States courts the plaintiff in error has duly pleaded in bar of the present suit. And which opinion and judgment of the supreme court of the state of Nebraska is in violation of section two, article three, and section two, article six of the Constitution of the United States, and the acts of Congress made pursuant thereto, and section one, article fourteen of the amendments to the Constitution of the United States.

VII.

Because the supreme court of the state of Nebraska in its opinion and judgment herein denied to the plaintiff in error the benefit and protection of its judgment previously rendered between the parties hereto upon the same issues by the circuit court of the United States for the district of Nebraska, pursuant to the

opinion and judgment of the supreme court of the United States in the case of *Northern Assurance Company of London v. Grand View Building Association,* reported in volume 183 of its reports at page 308 et seq., in this: That in its opinion and judgment herein the supreme court of the state of Nebraska held and adjudged that the alleged oral understanding or agreement between the defendant in error and the agent of the plaintiff in error to the effect that the insurance company would permit concurrent insurance contrary to the express terms of the written policy in controversy was in full force and effect between the parties hereto at and before the fire described in the evidence, whereas the United States courts had previously held and adjudged in the manner aforesaid that as against the express terms of the policy no such understanding or agreement existed, which opinion and judgments were duly pleaded by the plaintiff in error in bar of the present suit. And which opinion and judgment of the supreme court of the state of Nebraska is in violation of section two, article three, and section two, article six of the Constitution of the United States, and the acts of Congress made pursuant thereto, and section one, article fourteen of the amendments to the Constitution of the United States.

VIII.

Because the supreme court of Nebraska erred in its judgment herein in this, to-wit: The plaintiff in error pleaded as a defense to this suit the following provision of its policy:

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

The insured property was burned June 1, 1898. The petition in this suit was filed January 21, 1903, and this action is barred under the policy according to its terms. Sections five and ten, title II of the Code of Civil Procedure of Nebraska are as follows:

"Sec. 5. Civil actions can only be commenced within the time prescribed in this title after the cause of action shall have accrued.

Sec. 10. Within five years an action upon a specialty or any agreement, contract, or promise in writing, or foreign judgment."

The supreme court of Nebraska construed said sections of the Code of Civil Procedure above quoted to annul the above clause of the written contract between the parties to this suit, which requires the assured to bring its action within twelve months next after the fire; and said sections five and ten, title II, Code of Civil Procedure of Nebraska, as thus contrued by the supreme court of Nebraska, impair the obligation of the contract between the parties hereto as above recited, and as thus construed, said sections violate section ten, article one of the Constitution of the United States.

(See assignment of errors, 143.)

The questions presented for the decision of this court may be conveniently discussed under two general propositions, that is to say:

First: That the judgment herein operates to deprive the plaintiff in error of the benefit and advantage of its judgment rendered in the circuit court of the United States for the district of Nebraska, pursuant to the opinion and judgment of the supreme court of the United States in the case of *Northern Assurance Company of London v. Grand View Building Association*, reported in volume 183 of its reports at page 308, et seq., wherein the issues in the present suit were finally adjudicated between the parties hereto, and thereby deprives the plaintiff in error of the rights and protection assured it by section 2, article 3, and section 2, article 6 of the Constitution of the United States, and the acts of Congress pursuant thereto, and section 1, article 14 of the amendments to the Constitution of the United States.

The various phases of this question are covered by the first, second, third, fourth, fifth, sixth and seventh assignments of error.

Second: That the judgment herein construes the statute of limitations of Nebraska to annul the provision of the policy requiring suit for the recovery of any claim thereon, in any court of law or equity, to be commenced within twelve months next after the fire; and thereby impairs the obligation of the contract between the parties, contrary to the provisions of section ten, article one of the constitution of the United States.

First Proposition.

The Plaintiff in Error Submits That From the Record the Defendant in Error is Precluded From Prosecuting the Present Suit, Because the Issues Herein Have Been Adjudicated by the United States Circuit Court for the District of Nebraska in the Case of Northern Assurance Company of London v. Grand View Building Association, Supra.

The record shows that at the time the policy in controversy was issued, the property covered by it was already insured in the sum of $1,5000 in the Fireman's Fund Insurance company; that the policy contained a provision making it void if the insured at the time it was issued had contracted other insurance on the same property; that the assurance company first learned of the prior insurance after the fire, and upon the receipt of the notice from the building association that the property had been destroyed; and that it denied all liability under its policy for the reason that under the terms and conditions aforesaid it was void.

The building association thereupon sued the assurance company in the state court upon the written policy to recover judgment for the full amount of its loss. Before bringing the suit, however, counsel for the building association, with full knowledge

of the facts and circumstances and after careful study and reflection, determined that notwithstanding the rule that testimony would not be received in a law action to vary or contradict the terms of a written instrument, the circumstance that the agent of the insured at the time he requested the insurance and before the policy was issued, advised the agent of the assurance company of the existence of prior insurance would entitle him to show by parol testimony certain conversations between the agents of the parties occurring during the negotiations which would preclude the assurance company from asserting any right or deriving any benefit from the stipulations against concurrent insurance.

To state the matter in the words of counsel:

> "I conceived, notwithstanding the fact that the policy in terms restricted other insurance, that we could plead the fact of the agent's knowledge and his omission to make the contract as the assured had supposed it to be by way of an equitable estoppel, and in that action (referring to the law action) we could supplement the written instrument by these matters which were pleaded in addition to it there, and in that forum obtain the same relief which we are now seeking by reformation in this court. * * * * * * I concluded our only remedy in the forum to which the cause was removed (referring to the United States circuit court for the district of Nebraska) on the facts as stated in the present petition (referring to the petition in the subsequent equity suit) was in an action at law, and in that forum we could have relief by the doctrine of equitable estoppel." (106.)

Indeed, the matter is put in the majority opinion of the circuit court of appeals in the case in these words:

> "We are of opinion, therefore, that the delivery by the agent of the insurance company of the policy in suit with knowledge at the time of the existence of the prior insurance estops the insurer from pleading the prior insurance as a defense." (82.)

If, for the purposes of the present discussion, we arrange the pleadings in the law action so as to present the issues in a logical order, we shall find:

First: The petition of the building association, plaintiff in the law action; the issuance of the written policy in question; the destruction of the property covered by it; and the amount of the loss; with the prayer for judgment for such amount.

Second: The answer of the defendant, the assurance company, confessing the facts stated in the petition, and showing, by way of avoidance, that at the time the policy was issued the property covered by it was insured in the sum of $1,500 in the Fireman's Fund Insurance Company, which, under the terms of the written policy, made the same void.

Third: The reply admitting the truth of the allegations of the answer and pleading in avoidance that at and before the policy was issued the building association communicated to the agent of the assurance company the fact of such prior insurance, and that by reason thereof the latter should be estopped from showing such prior insurance or from taking any advantage of it.

The circumstance that the building association in its petition charged that at the time the policy was issued the property covered by it was already insured with another company, and that the knowledge of that fact was communicated to the agent of the assurance company during the negotiations does not in any way change the character of the controversy or the nature of the issues involved.

In other words the building association by bringing its law action upon the policy *as written* elected to stand upon it *as written*, upon the theory that in a law action it could meet the plea of prior insurance by showing matters which if established by competent testimony would deprive the assurance company of the benefit of the stipulation against such prior insurance. And it is unimportant

how this matter is phrased: whether it is said that the assurance company is estopped or that it waived its right under the stipulation against concurrent insurance. The plain, clear fact is, that the building association merely asked that a judgment be rendered on the policy *as written*, notwithstanding the fact of the prior insurance and the stipulation against it, because "under the circumstances" it would be unjust and inequitable to permit the assurance company to defeat the plaintiff's claim under the policy *as written* by showing the existence of prior insurance.

Under the contention of opposing counsel, the doctrine of estoppel as applied to the facts in this case simply meant that inasmuch as the agent of the assurance company, in delivering the written policy without noting the agreement for contemporaneous insurance thereon, treated the property the same as if it had been then uninsured, the court would also treat it the same as if it had been then uninsured. To put the thought in other words: the court would close its eyes to the fact of prior insurance and regard the property as it was obviously regarded by the agent of the assurance company when he delivered the policy without noting thereon the understanding for contemporaneous insurance.

At pages 9 to 12 in his brief in the state supreme court counsel for the building association states his theory of the law action in these words:

"Plaintiff's original petition was drawn with reference to these authorities. (Referring to authorities cited therein.) It is a misstatement to assert that plaintiff sought to recover upon the policy *as written*. On the contrary, the extrinsic facts not shown upon the face of the policy, but nevertheless necessary to excuse the failure of plaintiff to comply with the stipulation prohibiting other insurance, were substantive and necessary elements of plaintiff's cause of action, and, as such, were embodied in his petition in the suit at law. In its original suit at law, plaintiff confessed that by the strict letter of the policy,

it could not recover, and sought to avoid the provision prohibiting concurrent insurance by facts pleaded extrinsic of the written instrument. * * *"

After quoting from the petition and answer in the law case, wherein the facts constituting the grounds of the estoppel are stated, he proceeds as follows:

"Nothing can be plainer, on the face of the record, than that the plaintiff, in the prior suit at law, grounded its right to relief upon these additional facts pleaded, outside of the conditions written in the instrument itself; and that it sought to maintain its action, not upon the letter of the policy, but by virtue of the equitable estoppel which it pleaded, and which was then thought to be available in an action at law. It turned out that the plaintiff's faith in the precedents mentioned was misplaced. The lower courts upheld its contention; but in the extraordinary proceedings by certiorari, the supreme court of the United States held that the rule of equitable estoppel was not admissible in such cases, and that courts of common law jurisdiction were powerless to afford relief based upon these extrinsic facts shown outside of the written instrument. For the purposes of this case, it is now determined judicially, by a judgment which is conclusive on all parties to the record, that plaintiff never had a remedy at law."

Herein counsel is particular to separate the policy or written instrument from the *"extrinsic facts"* upon which he relies to obtain relief notwithstanding the fact of the prior insurance. While disclaiming to recover upon the policy *as written*, he nevertheless asks for a judgment upon the "policy as written," relying upon the *"extrinsic facts"* to relieve his client from the legal consequences of the prior insurance in the Fireman's Fund Insurance Company. He was not seeking to reform the written policy; neither was it his purpose to establish a *different* agreement from that expressed in the

policy. The fact of prior insurance together with the conversations between the agents of the parties respecting such insurance were for the sole purpose of obtaining relief from the legal consequences of the act of the building association in accepting the policy, notwithstanding it contained the stipulation against concurrent insurance.

The suggestion of counsel "that it is a misstatement to assert that the plaintiff sought to recover upon the policy as written" is not supported by his further statements in this connection. What he did was to bring his action at law upon the policy as written, asking for judgment according to its terms and conditions, relying upon extraneous facts to preclude the defendant from making its defense under one of the stipulations thereof. This surely was an appeal to the court to enter a judgment upon the policy as written, whether the court recognized or rejected the grounds upon which he based his claim for relief from the legal consequences of the prior insurance upon the property.

Without doubt courts have jurisdiction to fully adjudge all issues necessarily involved in a controversy between parties in a law action, even where matters are pleaded by way of estoppel, or waiver. Thus, had the prior insurance in question been placed subsequent to the issuance of the policy, with the knowledge of the assurance company, and without objection, the building association could have recovered upon the ground that the act of the assurance company constituted a waiver of the stipulation against such insurance, and it is not important whether this legal consequence be characterized as "a ratification" or "a waiver" or "a subsequent agreement" or "an estoppel in pais;" for the relief itself would be afforded upon the ground that it would be unjust to permit the assurance company to take advantage of its own wrong. Having remained silent when it ought to have spoken, it shall not speak when it ought to remain silent. But in such cases parol testimony

is admissible, since it cannot vary or contradict the terms of the original policy.

In the supposed case the conduct of the parties could be shown by parol testimony, because occurring subsequent to the execution of the policy, since parties may, even by understandings, express or implied, change their written agreements after they have been executed, and parol testimony is admissible for this purpose. Such testimony does not, in any way, tend to establish an agreement contrary to the one expressed in the writing: it simply relates to an agreement made subsequent to and amendatory of the original agreement, and not in conflict with it.

In the law action between the parties the conduct of the agent of the assurance company, in delivering the policy with the stipulation against concurrent insurance, could afford grounds for an equitable estoppel, upon the theory only, that, under the circumstances, his acts were contrary to the understanding, and, therefore, in bad faith. To show the bad faith, it was necessary to establish an understanding implied from the circumstances and conversations referred to, and in conflict with the agreement expressed in the policy. The failure, therefore, of the building association to make good its plea was not due to the fact that the court had not jurisdiction to determine matters pleaded by way of estoppel, but solely to the fact that such matters could not be established without assuming, and proving by parol testimony, the existence of an understanding implied from the conversations, and conduct, occurring during the negotiations which resulted in the policy as written.

Briefly stated, our view of the present dispute is, that by its action at law, the building association *elected* to stand upon the policy *as written*, and to ask the court to adjudge that the agreement expressed therein was in full force and effect at the time of the fire, and to adjudge whether or not the matters pleaded by

way of estoppel were sufficient in law to deprive the assurance company of its benefit under the stipulation against concurrent insurance. And, having elected to stand upon the policy as written, and to litigate the matters involved in the plea of estoppel, in its cause of action upon the policy as written, the building association is precluded from further litigating these issues with the assurance company in any other forum. The building association will not be heard to assert in the present suit that any other agreement than the one expressed in the written policy was in force at the time of the fire; nor will it be heard to assert, under any form of terminology, that the assurance company should be deprived of its rights and benefits under the policy as written, on account of the conversations and conduct of the parties during the negotiations in which it was issued.

The suggestion of counsel "that for the purposes of this case it is now determined judicially, by a judgment which is conclusive on all parties to the record, that plaintiff never had a remedy at law" implies that this was the *only* question determined judicially in the law action. This is equivalent to saying that no question whatever was determined. For the law defining the jurisdiction of courts was just as conclusive upon the parties before the action was brought as it was after the judgment was rendered in it. It can hardly be possible that nothing substantial was adjudicated in the long and expensive litigation which brought the case to this court for final judgment.

In the present proceeding, however, the building association seeks to establish an agreement which conflicts with the agreement expressed in the written policy, and which we submit has by the judgment of this court, been conclusively determined to have been in force at the time of the fire.

In the case of *Steinbach v. Relief Fire Insurance Co.*, 77 N. Y., 498, the plaintiff sued upon a policy of insurance against fire on

his stock of goods. There was a provision in the policy declaring it to be of no effect should the assured use the premises for storing or keeping goods or merchandise hazardous, according to a specified class. This provision was violated by the assured, the fire originating in the articles kept contrary to this provision. The plaintiff sued on this policy in the superior court at Baltimore. The company removed the suit to the federal court and defended upon the ground that the keeping of fireworks was a breach of the policy. The court sustained the defense and gave judgment for the defendant. The case was taken by writ of error to the supreme court of the United States and there the judgment was affirmed. 13 Wall., 183. Before the action was commenced in Baltimore, the plaintiff had sued the Lafayette Fire Insurance Company in the supreme court of the state of New York, upon a similar policy upon the same stock of goods and had recovered. The case was carried to the court of appeals and the proof rejected by the United States court was held competent, the Commission of Appeals refusing to follow or be bound by the decision of the supreme court of the United States in the Maryland case.

Subsequently the plaintiff commenced an action in the supreme court of the state of New York to reform the policy involved in the suit in the federal court, by inserting therein permission to keep fireworks, on the ground that such permission was omitted from the policy by mistake, and to recover on the policy as thus reformed. Having been defeated in the inferior courts of the state of New York, upon the ground that the judgment in the United States court was a bar to the maintenance of the action, the case was brought to the court of appeals and decided upon the sole question as to whether or not the plaintiff was barred by such judgment. In its decision affirming the judgment below the court said:

"Whatever was necessarily determined in that action concludes the parties, and can never again be brought into litigation between them, so long as the judgment therein remains in force. That is the universal rule always applied, no matter how much injustice may be done in a particular case. Such a rule of law, which generally tends to justice, cannot be changed to meet the exigencies of a case where a different rule would work out juster results.

In order to bring a case within the rule, the second suit must be founded substantially upon the same cause of action as the first; and the test of that is that the same evidence will support both actions; and the rule is the same, although the two actions are different in form: (*Gregory v. Burrall*, 2 Edw. Ch., 417; *Rice v. King*, 7 J. R., 20; *Johnson v. Smith*, 9 id., 383.) And it matters not that the former action was decided upon erroneous grounds: (*Morgan v. Plumb*, 9 Wend., 287.)

Here there was but one contract of insurance, and the cause of action in the Baltimore suit, as in this, was founded on that. In that suit the plaintiff sought to recover by proving that he was permitted to keep fireworks. By the same proof he seeks to recover in this. There he sought to prove the permission by parol. Here he seeks preliminarily to have the writing reformed, so that he can prove it by the writing. If he could succeed here, he would in some form have to prove precisely what he offered to prove there, to-wit: that he was permitted to keep fireworks. If the plaintiff could succeed in reforming this contract, it would not change its scope or effect. It would, according to the decisions in this state, be the same contract still. The only change would be that the plaintiff would have direct written proof of what, without such reformation, would rest upon construction and inference based upon other provisions in the contract, and upon parol evidence. The contract would then be, in its legal effect, the same as that the plaintiff sought to enforce in the former suit.

It is admitted by the plaintiff that the judgment against him in the former action is a bar to any recovery in this, unless he can

change the contract. Now, what was determined in that action? Clearly that the contract between the parties was such as was embraced in the policy declared on and proved in that action; and that the plaintiff had violated the policy, by keeping the fireworks. Now he seeks to establish, in this action, that that was not the contract, and to have it reformed; and that the real contract between the parties was not violated. He sought, in that action, to recover for his loss, and gave all the proof he could to show that he was entitled to recover. Now without alleging that there was more than one contract of insurance, or more than one title or right, upon which to base a recovery, he seeks to recover for the same loss. This is a case, it seems to me, where the doctrine of *res adjudicata* must apply, and bar a recovery, unless plain principles of law, which have always been regarded as important in the administration of justice, are disregarded.

According to the case of *Washburn v. Great Western Ins. Co.* (114 Mass., 175)—in all its essential features like this—the plaintiff, having elected to sue upon the contract as it was, and been defeated, is bound by that election, and cannot now maintain this action to reform the contract."

In bringing the case to the law courts, counsel selected a forum competent to pass upon all the issues necessary to determine the question of liability under the policy, and the plea of estoppel to the answer of the assurance company touching the prior insurance did not oust the court of its jurisdiction to render judgment in favor of the assurance company. The claim for damages under the contract as written was defeated because the court rejected the testimony produced in support of the estoppel.

This left the case to be decided upon the pleadings and competent proofs relating to the policy as written and the circumstances arising under it. As there was no dispute, either as to the agreement itself, or the destruction of the property by fire, or the existence of prior insurance, the court awarded judgment in favor of

the assurance company. To assert, therefore, that the question of what agreement was in force at the time of the fire was not adjudicated, simply because the court found the testimony in support of the estoppel was incompetent, is equivalent to asserting that wherever a litigant fails to make out his case for want of competent proofs, nothing is adjudicated.

In the final analysis of the law case, one of the issues which the court necessarily adjudged was, that the agreement expressed in the written policy was the agreement in force at the time of the fire. While it is true the building association pleaded certain conversations and conduct which, *if admitted for that purpose* would have tended to prove a different agreement than the one expressed in the policy, yet these conversations and conduct were neither pleaded, nor sought to be proven, for *that* purpose, but solely to deprive the assurance company of its defense under the policy *as written and sued upon.*

It is unnecessary to cite authorities to the proposition that where a plaintiff brings an action upon a written contract in a law court, he elects to stand upon the contract, as written, and if he prosecutes his action to final judgment, and is defeated, he cannot afterwards have his written contract reformed in chancery. (See Black on Judgment, section 632; section 678, p. 816; and section 518, p. 615.)

Sanger v. Wood, 3 Johns Ch., 416;

Thomas v. Joslyn, 36 Minn., 1, 29 N. W., 344;

Gaffney v. Megrath, 23 Wash., 476, 63 Pac., 520;

Ward v. Green, 88 Tex., 177, 30 S. W., 864;

Kearney Milling and Elevator Co. v. Union Pacific Ry Co., 97 Ia., 719, 66 N. W., 1059;

Thompson v. Howard, 31 Mich., 312;

Thomas v. United Firemen's Ins. Co., 108 Ill., App. 278.

Opposing counsel concede the law in this respect.

Counsel, however, insists that he did not bring the law action upon the contract, *because* he expected to prove certain extrinsic facts which would operate to deprive the assurance company of its defense under the contract as written, on account of the prior insurance. This is equivalent to saying that one's motives in bringing an action upon a contract is sufficient to determine the character of the action and the status in law of the parties to it.

After the fire, the building association made its claim upon the assurance company for damages on account of the destruction of its property. To recover its damages, under the circumstances, two courses were open: that is to say, either to sue upon the contract as written; or, if the contract did not express the true agreement, to sue in equity to have it reformed to express the true agreement and the damages assessed according to the facts.

To sue upon the contract would be to affirm it.

To sue for reformation and have the damages assessed would be to disaffirm it—positions utterly inconsistent, and which neither the circumlocution of courts or the inapt use of legal phrases can reconcile. The dilemma was one of alternatives: To choose one course, was to finally abandon the other, and *vice versa*.

While a few of the law courts have granted relief in similar cases they have not done so upon the theory that the plaintiffs, in bringing their actions, were disaffirming the written contracts and seeking to recover upon agreements in conflict with them, but solely upon the theory that they were affirming them and relying upon extrinsic facts to deprive the defendants of their defenses under their terms and conditions.

Had counsel instituted the law action to reform the policy to fit the conflicting agreement, and met with defeat, because the court had no jurisdiction to grant the relief, he might well have insisted that he had mistaken his remedy, and carried his grievance to the

wrong court, because in such case he would have sought the particular relief—the substitution of the verbal agreement for the written one—which only a court of chancery can give.

The circumstances involved in the present controversy neither bring it within the principle which opposing counsel asserts, nor the authorities cited in support of his argument. The judgments and opinions reviewed by him relate to disputes in which the parties against whom prior judgments were pleaded in bar had taken no inconsistent positions in the course of their litigation.

We have no concern with the question whether or not the building association had a *choice of remedies* to enforce a *particular right*. What it had was a choice between two inconsistent and irreconcilable rights. The law furnished a remedy appropriate to the enforcement of each right, but it did not furnish both remedies for the enforcement of either of them. The remedy at law could only be invoked to enforce the rights under the policy as written; and the remedy in chancery could only be invoked to establish the parol agreement and substitute it for the agreement expressed in the written policy. Thus in bringing its action at law, the building association elected to enforce its rights under the policy as written. In doing this, it abandoned its rights under the alleged parol agreement.

We assume that counsel for the building association will make the contention in this court that he made in the supreme court of the state. In his brief in that court, he based his theory and argument upon three propositions:

FIRST:

"The present suit in equity states a cause for reformation which the record in the first suit discloses was not then in issue."

SECOND:

"The situation exhibited here by the pleadings and proofs shows merely that the attempt by the first suit to obtain redress failed because plaintiff there misconceived its remedy. The first suit was a misadventure, and the judgment rendered therein is not a bar to the prosecution of the only cause of action ever available to plaintiff."

THIRD:

"The present suit and facts pleaded in the present petition are not inconsistent with the position taken in the prior suit. Plaintiff did not have the choice of two inconsistent remedies, the selection of one of which would destroy the other. It had but a single remedy. In the effort to obtain redress at law, it mistook the remedy and invoked a mode of relief incompatible with the facts stated on the face of its own petition."

In these propositions, the learned counsel assures us that in the present suit he is seeking reformation of the policy, whereas in the former suit he was not seeking reformation of the policy. He also assures us that because of these facts, his former suit was a misadventure because he misconceived the remedy. If the right which he asserts in the present suit is not inconsistent with the right asserted in the former suit, it may be his first adventure was merely a mistake.

In the former suit, however, he was not seeking reformation, because he was not relying upon the parol agreement arising from the circumstances attending the negotiations for the written policy as a substantive ground for recovery.

He did not seek to establish a parol agreement in conflict with the agreement as written and as a substitute for it, but, on the contrary, he affirmed the agreement as written and pleaded the circumstances attending the negotiations to estop the assurance company from taking advantage under the stipulation against prior insurance—strictly as a matter of confession and avoidance. He,

in legal effect, said: "Yes, I concede you have the written policy which prohibits prior insurance, but, under the circumstances, what are you going to do about it?"

He now says the agreement as written was never made; that it never had a legal existence. Thus his attitude in the former case was not only inconsistent, but absolutely irreconcilable with his attitude in the present case. In the former case, he admitted the agreement was made as written, but insisted that the assurance company was so situated it could make no use of it. In the present case, however, he insisted that the assurance company has no such agreement, and, therefore, can make no use of it. One can hardly say that a thing exists and does not exist without laying himself liable to the charge of inconsistency.

In conceding that the policy as written was in force and effect at the time of the fire, for the purposes of the law action, counsel conceded it was in force and effect for all purposes, for the reason that the agreement he now seeks to establish for the purpose of reformation, was the agreement the parties had in contemplation and intended to incorporate in the policy as a part of the original contract. To concede, therefore, that the stipulation against prior insurance was in force at the time of the fire, even though he intended to estop the assurance company from deriving any benefit from it, was to waive the right to insist that the understanding, to permit the prior insurance, was the true agreement.

The cases which opposing counsel relied upon to support his contention in the state courts were cited to the proposition, to put the matter in his own words, that

"There is no established rule that a chancery court will refuse to entertain a suit to enforce an equity, independent of the terms of a written instrument, by which the parties intended to define their rights, because of a prior resort to law, to enforce the contract as written. The firmly established doctrine is directly to the contrary."

An examination of these cases shows that the peculiar circumstances in each justified the decision of the court to ignore the former adjudication. For instance, *Hawley v. Simmons*, 102 Ill., 115, was a suit in equity to reform a deed, and was instituted after an action in ejectment at law had failed. The judgment in ejection being pleaded in bar, the court rejected it for the reason the plaintiff was not endeavoring to enforce the title which was defeated by law. In the action of ejectment, the plaintiff sought to establish his ownership of the land in controversy by his legal title. in the subsequent suit, he invoked the aid of equity to assert his equitable rights.

The litigation between the *Commercial Union Assurance Co. v. New Jersey Rubber Co.*, 64 N. J. Eq., 338, embraced in three published opinions between the same parties, involved two different agreements; the agreement expressed in the written policy; and the "bi-lateral agreement" (so called by the courts), which was not designed to be any part of the insurance policy, but merely to define the circumstances under which the insurance policy should become effective.

Besides, immediately upon the insured bringing its action at law upon the policy, the insured appealed to chancery for relief against the strict terms of the written policy, under the "bi-lateral agreement." The case is both interesting and instructive and, we submit, supports our contention.

Numerous other cases were cited by counsel with comment, and in nearly every instance, the subsequent suit in equity was maintained, notwithstanding the plea of former adjudication, upon the ground that the equitable right was independent of the legal right sought to be enforced in the former suit.

Unless it can be shown that the parol understanding to permit concurrent insurance was independent of the written stipulation to prevent it, the theory of opposing counsel and the authorities cited in aid of his argument are inapplicable.

As suggested, if we trace the contentions of the parties to their ultimate source, we shall find they originate in a dispute as to which of two irreconcilable agreements is the true, and, therefore, the only one—whether the mutual rights and obligations involved are to be found in the written policy or in the conversations and conduct of the agents, and the attending circumstances, which were a part of the negotiations deliberately and solemnly attested by their written declarations.

Second Proposition.

The Judgment Herein Construes the Statute of Limitations of Nebraska to Annul the Provision of the Policy Requiring Suit for the Recovery of any Claim Thereon, in any Court of Law or Equity, to be Commenced Within Twelve Months Next After the Fire, and Thereby Impairs the Obligations of the Contract Between the Parties, Contrary to the Provisions of Section 10, Article 1 of the Constitution of the United States.

The policy contains the following provision:

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

This provision was expressly pleaded by the assurance company in paragraph VII of its answer. (16.)

In this connection, attention is directed to the chronology of this litigation:

December 31, 1896: The policy was executed and delivered to the building association. (Stipulation of facts of this case, p. 90, et seq., and copy of policy opposite p. 63.)

June 1, 1898: Insured property was burned. (Stipulation of facts, paragraph 4.)

July 26, 1898: The building association forwarded proofs of loss. (Stipulation of facts, paragraph 5, p. 91.)

August 2, 1898: The assurance company denied liability by letter (stipulation of facts, paragraph 5), which contains the following statement:

"We have your favor of the 26th ult., enclosing to us what purports to be proof of loss, making claim under our policy * * * and beg to say in reply that your sworn statement therein advises us that you had other insurance on this same property to the amount of $1,500. This additional insurance held by you was without the knowledge or consent of this company, and was not permitted by agreement as provided for in lines Nos. 11, 12 and 13 of the printed conditions of our policy, to which we beg to refer you.

We, therefore, regret to have to advise you, and do now hereby say to you, that the Northern Assurance Company specifically and absolutely denies any and all liability under said policy No. 310024, held by you, holding that said policy has been void from the date of its issue by reason of the said provision with regard to other insurance above referred to." (62.)

August 4, 1898: The assurance company tendered the building association the sum of $33.75, premium paid on policy, which the association refused to receive. (Stipulation of facts, paragraph 5.)

August 30, 1898: The building association commenced the former action in the district court of Lancaster county, Nebraska, which was thereafter removed to the United States circuit court for the district of Nebraska. (Stipulation of facts, paragraph 6, pp. 91, 92.)

December 19 and 20, 1898: The former action was tried in the United States circuit court for the district of Nebraska, and certain special findings of fact returned therein. (Pp. 55, 56.)

March 26, 1900: The United States circuit court of appeals for the eighth circuit, SANBORN, J., dissenting, affirmed the judgment of the circuit court. (78.)

May 22, 1900: A writ of certiorari was issued from this court. (89.)

January 6, 1902: The former suit was decided in this court. (183 U. S., 308.)

May 12, 1902: Judgment was entered, pursuant to the mandate from this court, in the United States circuit court for the district of Nebraska. (93.)

January 21, 1903: The *present suit was* commenced in the district court of Lancaster county. (10.)

The building association seeks in this case to have the court establish, by decree, an agreement which it may substitute for its policy of insurance, and upon which it may make its claim, and have a judgment against the assurance company. The purpose of the action is not to recover upon the written contract. The recovery is but incidental to the reformation; or, in other words, the money judgment is a specific performance of the reformed contract. There would be no occasion to resort to an action in equity to compel a specific performance of a contract over which there is no dispute, and upon which damages are confessedly payable; and if the policy had in the first place contained the agreement which the court has now added to it, there would have been no dispute between the assurance company and the building association. It so happened in this case that the district court reformed the policy in adding thereto, by its decree, the following words:

"Consent is hereby given to additional insurance in the sum of $1,500, to be concurrent herewith." (See fourth conclusion of law in decree of the district court, p. 29.)

This conclusion is based upon the eighth finding of fact, which recites that the agent of the assurance company "by mistake failed to insert such provision in the policy." (27.)

Having acquired jurisdiction of the case, for the purpose of reforming the old or creating a new agreement, the case was properly retained for the assessment of the damages, under a familiar rule generally enforced. The leading case which states the rule is *Tayloe v. Merchants Fire Ins. Co. of Baltimore*, 9 How., 390, in which it is said:

"As the only real question in the case is the one which a court of equity must necessarily have to decide, in the exercise of its peculiar jurisdiction in enforcing a specific execution of the agreement, it would be an idle technicality for that court to turn the party over to his remedy at law upon the policy. And, no doubt, it was a strong sense of this injustice that led the court at an early day to establish the rule, that, having properly acquired jurisdiction over the subject for a necessary purpose, it was the duty of the court to proceed and do final and complete justice between the parties, where it could as well be done in that court as in proceedings at law."

Four sections of the statute of limitations of Nebraska were relied upon to defeat the action of the building association. Sections 5, 10, 12 and 16 of Title II, Code of Civil Procedure of Nebraska, are as follows:

"Sec. 5. (Limitation.) Civil actions can only be commenced within the time prescribed in this title, after the cause of action shall have accrued."

"Sec. 10. (Written instrument—Foreign judgment.) Within five years, an action upon a specialty, or any agreement, contract, or promise in writing, or foreign judgment."

"Sec. 12. (Trespass to realty—Personalty—Replevin—Torts—Fraud.) Within four years, an action for trespass upon real property; an action for taking, detaining, or injuring personal property, including actions for the specific recovery of personal property; an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated: an action for relief on the ground of fraud, but the

cause of action in such case shall not (be) deemed to have accrued until the discovery of the fraud."

"Sec. 16. (Other Relief.) An action for relief not hereinbefore provided for, can only be brought within four years after the cause of action shall have accrued."

The assurance company pleaded both the four and five year statutes in bar. (See answer, paragraph VIII and XI, pp. 16, 19.)

The five year statute was pleaded upon the theory that the building association was chargeable, upon the receipt of its policy, with knowledge of its terms, and that it did not contain the stipulation, which, in this suit, it seeks to have added thereto.

The four year statute was pleaded upon the theory that at all events, the building association was advised of the omission of the alleged stipulation at the time it brought its former suit, which was more than four years prior to the commencement of this suit; and it was insisted by the assurance company, at the trial in the district court and in argument before the supreme court of Nebraska, that if the action was to be considered as brought upon the policy, and the five year statute applied, that in view of the form of the action which confessed that no recovery could be had without a reformation of the written policy, the statute began to run from the time when the cause of action accrued, viz., at the date of the policy. For an action to reform or establish a contract is not the same kind of action which accrues when and because of a fire. The former involves the right to recover in a certain contingency: and the fire is that contingency.

It was adjudicated before the present action was commenced that the building association took this policy, charged with notice of its contents. In discussing that provision thereof, which limits the powers of agents, the opinion of this court in the former suit contains the following language:

"Where fire insurance policies contain provisions whereby agents may by writing endorsed on the policy, or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation." (183 U. S. 361.)

This policy was tendered to, accepted and kept by the building association's president. The fact is thus found by the district court:

"Said policy of insurance so issued by the defendant company to plaintiff herein, was delivered to the president of said plaintiff company, who received the same and without examination placed the same in his safe, without knowledge of the contents of said policy, as to its terms, herein expressly found and described." (26.)

That Mr. Walsh did not in fact know what his policy contained is immaterial. The supreme court of Nebraska comment upon his negligence, saying: "that he was somewhat negligent in so doing, and in accepting and retaining the policy without reading it, is evident." (130.)

But your Honors have said:

"It will not do for a man to enter into a contract and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written."

Upton v. Tribilcock, 91 U. S., 49, 50.

In *Wood v. Carpenter*, 101 U. S., 135, the doctrine is thus tersely stated:

"The means of knowledge are the same thing, in effect, as knowledge itself."

The rule of the state courts is the same.

Quinlan v. Ins. Co., 133 N. Y., 356, 31 N. E. 31;
Cleaver v. Traders Ins. Co., 65 Mich., 527, 32 N. W., 660;
Pennsylvania R. Co. v. Shay, 82 Pa. St., 198.

In the case last cited, Mr. Justice SHARSWOOD quoted the following language from the opinion of Chief Justice GIBSON in *Greenfield's Estate*, 2 Harris, 496:

"If a party, who can read, will not read a deed put before him for execution * * * he is guilty of supine negligence, which, I take it, is not the subject of protection either in equity or at law."

It is generally held in actions to reform contracts on the ground of mistake that the cause of action accrues upon the execution of the instrument, and the time when the statute begins to run is not postponed to the discovery of the mistake as it is to the discovery of the fraud, in cases where relief is sought on that ground.

Bryant v. Swetland, 48 O. St., 194, 27 N. E., 100;

Oakes v. Howell, 27. How. Pr., 145;

Exkorn v. Exkorn, 1 App. Div. Rep., 123.

If this rule had been applied, this action would have been barred December 31, 1901. If the rule, which postpones the running of the statute in cases of fraud until its discovery, be applied in cases of mistake so as to make the four year statute applicable, this action would certainly have been barred, at the very latest, four years from the date of the commencement of the former suit, viz., August 30, 1898. But the district court held that "the ultimate end of the action at bar is to recover upon a contract in writing, the action is not barred, therefore, until after a period of five years;" (29), and the supreme court of Nebraska, notwithstanding its ruling in this case that "an attempt to take unfair advantage of a mutual mistake is constructive fraud" that falls within the four year statute, thus disposed of the plea of the statute of limitations:

"This action was brought less than five years after the destruction of the insured property by fire, but more than four years after the discovery of the mistake in the terms of the policy. The question which provision of the statute of limitations applies

is not free from difficulty, but we have come with some hesitation to the conclusion that it is the former of them. If the sole object of the action was to obtain relief from the consequences of fraud, or to recover money or prperty obtained by its means, doubtless the four year limitation would govern; but actions like the present are, we think, founded upon the written contract, * * * *. The instrument, when written and accepted, was obligatory upon both, and the plaintiff can recover only for a breach of it. The aid of equity is required merely to enable him to show that he is not, in good conscience, to be held, as he is charged with being, guilty of committing the first breach of it, and to establish that a certain stipulation, which ought to have been, and which the parties intended should be, included in it, was mistakenly omitted. When equity has made the desired correction, according to the pleading and proof it proceeds to enforce not only the newly incorporated covenant, but the formal written contract as amended."

Therefore, the supreme court of Nebraska, upon reasoning which ought to have produced the "some hesitation" to which it confesses, treats the cause of action in the present suit as though it accrued at the time of the fire, to-wit, June 1, 1898; for otherwise the action would be barred under every provision of the statute of limitations of Nebraska. The disregard by the Nebraska court of the law, as expounded elsewhere, presents a background against which the contempt of that court for the right of private contract clearly appears. The same principles, which in the language of your Honors in the decision in the former suit between these parties, make "it reasonable and competent" for parties to an insurance policy to make their own contract and to agree that the knowledge and consent of the company with respect to concurrent insurnace "shall be manifested in writing, either by endorsement upon the policy, or by other writing," make it competent for them to agree than any suits upon the policy shall be commenced within twelve months next after the fire.

There are no restrictions upon the right to contract, except such as are imposed by public policy or the laws of the country under which the contract is made. A stipulation that there shall be no recovery upon a contract unless a suit is brought within twelve months from a time specified therein is not against public policy, nor against any law of the state of Nebraska. The intent and object of the so-called statute of limitations are not to restrict the right to contract, but to compel parties to disputes to bring their controversies before the courts within the time fixed by such statutes. And the statutes of limitation merely say that no such action shall be brought after a certain time. The stipulation of the contract is based upon the same principle as the statute: Neither confers any right of action, and the statute does not, and cannot be held to, affect the right of contract. In other words, the statutes of limitations of a state confer no privileges, but they themselves are restrictive in character.

Your Honors' attention is directed to the singular misfortune of the assurance company, in the case at bar, with respect to this particular matter, if the judgment of the Nebraska supreme court shall be affirmed. The testimony of Mr. Walsh, president of the building association, was taken upon the former trial under the issues then being tried. But from the testimony offered in that case, *all* that the jury found was, that *the agent* of the assurance company *had knowledge,* when the policy in suit was delivered to Mr. Walsh, that there was prior insurance upon the property, which was then in force. (See finding 7, p. 57.) It was not pretended at the former trial that there was, at the time of the delivery of the policy in suit, an agreement that the Northern Assurance Company should endorse on its policy consent to other insurance. After the former trial, and before the trial of the present case, Mr. Walsh died, and his testimony was admitted in evidence, over the objection of plaintiff in error, to establish the reformation prayed

for in this case. Thus no opportunity was afforded the assurance company to cross-examine Mr. Walsh upon the facts of this case after the claim was made that the assurance company's agent had consented to concurrent insurance.

Again this record discloses an attempt, upon the cross-examination of Mr. Borgelt, who was the assurance company's agent who issued the policy, to show that he had once received a bullet wound in his forehead, from which he suffered an impairment of his memory. He testified, both at this trial and at the former trials, *that he was not informed of the fact that there was other insurance* upon the property at the time he issued the policy in suit. What effect the suggestion that Mr. Borgelt's testimony was unreliable because of the impairment of his memory may have had upon the mind of the trial court it is impossible to say; but if the suggestion were a fact, the fact itself pleads for the enforcement of the contractual obligation, which has for its object the prevention of a situation which would put the defendant company at this great disadvantange.

Your Honors thus speak of precisely such a condition as this in the opinion in the former case:

"If the agent had died, or his memory had failed, the defendant company might have been at the mercy of unscrupulous and interested witnesses." (183 U. S., 364.)

Stipulations like this are to be found in the standard policies of all the states except Wisconsin. In eleven of the states the limitation is twelve months, and in three of them, two years. The New York standard form, which was the form upon which the policy in suit was written, is in general use in all those states which do not have standard policies of their own:

"The courts have uniformly held that such stipulation is proper and lawful unless specially forbidden by statute, as is the case in several states."

Ostrander on Fire Insurance, 2d. ed., sec. 405.

At the time the policy in suit was written, provisions of this kind had been generally sustained in the courts of the country, and their validity was established as a recognized principle of commercial law.

The Nebraska supreme court in *Barnes v. McMurtry*, 29 Neb., 178, (decided in 1890), had held that it was competent to make such an agreement, though, under the facts admitted by the pleadings in the case referred to a demurrer to the answer was sustained. It is said therein:

"No doubt the original consideration paid for the insurance and the policy issued thereon would bind the insured" (to an agreement of this sort).

In *German Insurance Company v. Fairbank*, 32 Neb., 75, 49 N. W. 711, (1891), it was held, of a similar provision containing a six months' limitation:

"If the condition of the policy * * * * was within the contemplation of the parties when the contract was entered into, then, doubtless, the failure of the plaintiff to commence his action within six months after the loss would operate as a bar to the action."

In that case, however, it was held that the six months did not begin to run until the cause of action accrued, which was after the proofs of loss were furnished; and that an action brought within six months after the expiration of the time when the proofs of loss were furnished was not barred. The policy in this case expressly recites that "it is made and accepted subject to the foregoing stipulations and conditions;" and the consideration for the policy is "the stipulations herein named" and the premium paid.

This court nearly forty years ago put this question at rest in the well considered case of *Riddlesbarger v. The Hartford Fire Ins. Co.*, 7 Wall., 386. In that case Mr. Justice FIELD, speaking for a unanimous court, used language which has been frequently quoted by the courts of the country, and is now woven in the juris-

prudence of America. With reference to a similar clause in a fire insurance policy, which had been attacked as against public policy, he said:

"The *rights* of the parties *flow from the contract.* That relieves them from the general limitations of the statute."

Upon the proposition that the special limitation clause of the insurance contract is against the policy of the statute of limitations, he said:

"The objection to the condition is founded upon the notion that the limitation it prescribes contravenes the policy of the statute of limitations. This notion arises from a misconception of the nature and objects of statutes of this character. They do not confer any right of action. They are enacted to restrict the period within which the right, otherwise unlimited, might be asserted. They are founded upon the general experience of mankind, that claims which are valid are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity, or that it has ceased to subsist. This presumption is made by these statutes a positive bar; and they thus become statutes of repose, protecting parties from the prosecution of stale claims, when, by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth. The policy of these statutes is to encourage promptitude in the prosecution of remedies. They prescribe what is supposed to be a reasonable period for this purpose, but there is nothing in their language or object which inhibits parties from stipulating for a shorter period within which to assert their respective claims. * * * The contract of insurance is a voluntary one, and the insurers have a right to designate the terms upon which they will be responsible for losses. And it is not an unreasonable term that in case of a controversy upon a loss resort shall be had by the assured to the proper tribunal, whilst the transaction is recent, and the proofs respecting it are accessible."

Of the general acceptance of the validity of such stipulations, Mr. Justice FIELD, citing decisions from Illinois, Vermont, Pennsylvania, Ohio, Georgia, Massachusetts, Iowa, New Hampshire and Rhode Island, said:

"The validity of the limitation stipulated in conditions similar to the one in the case at bar, has been elaborately considered in the highest courts of several of the states, and has been sustained in all of them, except in the supreme court of Indiana, *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind., 443, which followed an adverse decision of Mr. Justice MCLEAN, in the circuit court for the district of that state."

The supreme court of Nebraska, in its opinion in this suit, thus disposes of the limitation clause of the policy:

"The defendant contends that this action is barred by a limitation written in the policy and by the statute, and it is insisted that the decisions of this court in *Miller v. State Insurance Co.*, 54 Neb., 121, 74 N. W., 416, 69 Am. St., Rep. 709, and *Insurance Company v. Drennan*, 56 Neb,, 623, 77 N. W., 67, ought to be overruled. We are entirely satisfied with both the reasoning and conclusions in those cases. A man may not by contract deprive himself of the right to apply to the courts for the protection of his person, property, or liberty in the manner or within the time prescribed by public law. Otherwise he might be permitted to sell himself into servitude."

Miller v. Ins. Co., which was decided March 3, 1898, was the first decision of the supreme court of Nebraska which held that the limitation clause in the policy would not be enforced. The syllabus of that case is as follows:

"The statutes of this state provide in what time actions may be brought; and a contract which provides that no action shall be brought thereon, or for a breach thereof, unless within a time therein specified, which is different from the time which the statute fixes for bringing an action on such contract or for a breach thereof, is against public policy, and will not be enforced by the courts of this state."

It is to be noted that the opinion cites *Barnes v. McMurtry, supra,* which holds to the contrary. *Eagle Ins. Co. v. Lafayette Ins. Co.,* 9 Ind., 443, is also cited. This is the case which, as your Honors said, followed an adverse decision of Mr. Justice McLEAN, which has been since abundantly repudiated.

In the subsequent case of *Omaha Fire Ins. Co. v. Drennan, supra,* the Miller case was followed without discussion.

The supreme court of Nebraska has twice in this case disregarded the decisions of this court. Your Honors' decision upon the merits of the controversy was thus commented upon:

"The opinion of the majority being an adherence to the letter of an antiquated and wornout technical formality seems to us to be an ironical commentary upon the often repeated judicial boast that the law is a progressive science."

And the refusal of the court to give a force and effect to the decision of the former case is based upon the theory that your Honors fell into error in deciding the former case. Indeed, this is expressly stated in the following language:

"Either so, (that is, that your Honors' opinion was an adherence to the letter of an antiquated and worn out technical formality) or else, as we consider, the court fell into a still more grievous error."

In *Miller v. Ins. Co., supra,* which contains a statement of the reasons for nullifying the limitation clause of the policy, a sarcastic reference is made to a "respectable" line of authorities holding to the contrary of the views expressed by the Nebraska court. Among those "respectable" authorities is *Riddlesbarger v. Ins. Co., supra.*

We are here now asking your Honors to reverse this decision because by it the supreme court of Nebraska have so construed the statute of limitations of Nebraska as to work an impairment of the obligations of the contract between the parties. In other words, a provision of the contract, which in at least two decisions

prior to the date of the policy in suit, the supreme court had declared it was competent for the parties to make, is annulled by a series of decisions culminating in the one now before your Honors, rendered subsequent to the date of this contract, holding that the limitation clause is against the public policy of Nebraska as expressed in her statute of limitations.

Not only is the obligation of the contract impaired and the general rules of law disregarded; but if this decision is sustained, any other contract which the supreme court of Nebraska shall be called upon to construe may be mutilated to suit the pleasure of the court.

To restate, in brief, the argument upon this proposition, our contention is:

FIRST:

When the policy in controversy was issued, it was competent for the contracting parties to provide the limitation contained in it.

SECOND:

That immediately the contract became operative the provision of the federal Constitution prohibiting the impairment of contract obligations attached to it and operated to inhibit the state from passing any law impairing the same.

THIRD:

Notwithstanding the inhibition, the state courts have in the present suit, contrued a statute of the state and applied it to the subject matter in controversy, so as to deprive the assurance company of the benefit of the limitation, thereby denying to it its protection under section 10, article 1, of the Constitution of the United States.

In Conclusion

It is respectfully submitted that the judgment of the supreme court of Nebraska must for the reasons herein urged be reversed.

NORTHERN ASSURANCE COMPANY,
Plaintiff in Error.

By CHARLES J. GREENE and
RALPH W. BRECKENRIDGE,
Its Attorneys.

Omaha, March 31, 1906.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1905.

No. 40

Office Supreme Court U. S.
FILED
APR 18 1906
JAMES H. McKENNEY,
Clerk.

NORTHERN ASSURANCE COMPANY OF LONDON,
Plaintiff in Error,

v.

GRAND VIEW BUILDING ASSOCIATION,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF DEFENDANT IN ERROR.

HALLECK F. ROSE AND WILMER B COMSTOCK,
For Defendant in Error.

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IN THE SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A.D. 1905

NORTHERN ASSURANCE COMPANY OF LONDON, *Plaintiff in Error,* v. GRAND VIEW BUILDING ASSOCIATION, *Defendant in Error.*	IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

HALLECK F. ROSE AND WILMER B. COMSTOCK, for Defendant in Error.

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I.

STATEMENT OF THE CASE.

The bill, filed in the district court of Lancaster County, Nebraska, exhibits the very ordinary proceeding of an appeal to *the exclusive powers of a court of equity,* to reform a written contract so that it will express the real agreement of the parties. The issuance of the policy, the ownership, value

and loss of the insured goods by fire, are not subjects of controversy. No reference to averments respecting such matters need be had. The alleged mistake in the written contract was its failure to express an agreement, actually made by the parties, for carrying $1,500 of concurrent insurance. Paragraph 8 of the bill (printed record, p. 9) contained appropriate averments showing that, by reason of the mistake, plaintiff was without any remedy at law for enforcement of the contract, and was, therefore, compelled to appeal to the *exclusive powers of equity* to have the contract reformed, by adding the omitted clause, to conform to the actual agreement of the parties. Thus, the petition, upon its face, not only concedes, but affirmatively asserts that the court of law could afford him no relief.

The issue which this court, it is asserted, has power to finally adjudicate, upon the writ of error, was introduced by answer. Paragraph 9 of the answer (printed record, p. 17) avers in substance that September 29, 1898, plaintiff brought suit in the same court to recover $2,500 on the same policy, alleging in his petition therein that he had other insurance, and interposing pleas of waiver and equitable estoppel against the insurer, in avoidance of the policy stipulation aginst other insurance. That assured, by answer, denied liability, because consent to additional insurance was not shown by a written endorsement; and plaintiff replied that assured's agent wrote and delivered its policy, knowing of the additional insurance, and "with the intent, on the part of both plaintiff and defendant, that the same should be concurrent with the said subsisting insurance, and not avoided or affected thereby." That, after removal and appellate proceedings which were carried by *certiorari* to the United States Supreme Court, final judgment was rendered in favor of defendant. Paragraph 10 of the answer (printed record,

p. 18) pleads that, by prosecuting the previous action at law, plaintiff *elected* to abide by the precise terms of the written instrument; and that plaintiff is thus estopped, by such *election*, from asserting any right by virtue of the stipulation sought to be added by decree of reformation to the written policy.

It is now asserted that the judgment, upon this issue, involves an assumption by the state court of power to review the previous judgment of the United States Circuit Court, and to disregard that judgment if the conclusion reached is not, in the opinion of the state court, correct. That assumption misrepresents the record, the state court, and counsel. Issue was taken upon the above defenses by reply, which expressly admitted the rendition of the previous judgment and conceded its correctness and its binding and probative force. To exhibit the issue, of such delicacy, we here quote in full the averments of the reply, defining assured's contention in respect to the former judgment. These averments are embodied in paragraphs 8 and 9 (printed record, pp. 21–23) as follows:

"8. For its reply to paragraph IX of said answer, plaintiff says that the action therein mentioned and referred to was a suit at law, in which no equitable remedy was invoked, and that the court of law, wherein said cause was tried, was without power in said action to grant any equitable relief. Plaintiff further says that, in the said cause, all questions of fact in issue were found in favor of this plaintiff and against the defendant. It was found and determined in said cause that the fact of subsisting insurance, at the time defendant's policy was written, was known to the recording agent of defendant, A. D. Borgelt, and had been reported to said Borgelt by plaintiff prior to the issuance of said policy, and that said Borgelt, at the time, issued said policy with knowledge of said concurrent insurance, and that he then had authority from defendant to countersign and issue its

policy, and accept fire insurance risks on its behalf, and collect and receive premiums therefor. It was further found as a matter of fact in said cause that the property so insured exceeded in amount the sum of $4,000, and relief was therein denied to plaintiff, notwithstanding the finding of all the facts in plaintiff's favor, solely upon the legal ground that the court of law was without power to grant relief, except in accordance with the letter of said contract, and that a reformation of said policy was a condition precedent to plaintiff's right to enforce the same. Wherefore the plaintiff says that the court rendering the said judgment was without power to render the relief herein prayed for; that the relief herein sought is other and different relief from that sought in the action mentioned in said answer; and that the issues, in the respects aforesaid, are not identical, and that the judgment referred to in said answer is not an adjudication of the cause of action set forth in plaintiff's behalf herein.

"9. For reply to paragraph X of said answer, and to the separate defense set forth and pleaded therein, this plaintiff denies each and every allegation therein contained. For a further reply to said paragraph and defense, this plaintiff says that the suit, alleged in said paragraph to have been prosecuted by this plaintiff to a final judgment in the Supreme Court of the United States, was a suit at law, and was not a suit in equity; that in and by its petition in said suit, which was the same suit referred to in paragraph IX of said answer, there were no allegations or averments that were in any particular inconsistent with the allegations and averments set forth in the petition herein. On the contrary thereof, plaintiff, in the suit aforesaid, affirmatively alleged the failure of defendant to write upon such policy permission for concurrent insurance, and affirmatively alleged that the said policy was conditioned that it should be void if there be other insurance, without consent therefor endorsed thereon in writing. And plaintiff further alleged the knowledge of the agent of defendant of said other insurance, which had been duly reported to said agent. And, upon said facts, the plaintiff made no election to claim upon the policy as written and to waive his right to a reformation, but mistook his remedy merely in this: plaintiff alleged that by reason of the facts aforesaid the defendant had waived the said policy con-

dition and was estopped to claim exemption from liability by reason thereof, and that, by reason of said estoppel, plaintiff could maintain his action upon said policy in a suit at law without first resorting to a court of equity to have the same reformed. Plaintiff alleges that its present action is in no wise inconsistent with any fact alleged in said petition at law, but, it was held in said action at law, that the redress which plaintiff sued for, by obtaining a mere judgment at law on said contract, was not compatible with the facts which appeared in the petition itself, showing that the contract, as erroneously written by the defendant's agent, was, according to its letter, void until so reformed as to express the true intent and meaning of the parties thereto. Wherefore, by reason of the premises, the plaintiff says that it has not made any election to abide by the terms of the contract as the same was written; and upon the facts of this case as they exist, and as alleged in the petition of plaintiff in the suit mentioned in said answer, and in its petition herein, there was no choice or election of the remedies open to plaintiff, and plaintiff's sole remedy was in a court of equity, and for the relief herein prayed, and it is not estopped or concluded thereby to claim the relief sued for in this action, which is entirely compatible with all of the averments of the petition in the suit mentioned in said answer."

On the face of the pleadings, it appears, obviously and incontrovertibly, that defendant in error not only confessed the binding force and validity of the previous judgment, but that it distinctly and definitely counted on the judgment *as a judicial determination in its favor*, of the issue tendered by its bill, that it was without remedy at law, and was compelled to invoke the exclusive powers of equity and make the writing express the actual agreement, before it could have any relief, of any character, in any court. The suit in equity now before the court, therefore, instead of assailing the former proceedings and judgment, distinctly affirms their validity.

II.

The claim that the state court refused full faith aud credit to the former judgment, presents to this court the single inquiry: Did the former judgment receive the same credit, that is, in the same forum, accorded to the judgments of the courts of the state, in like circumstances?

The purpose of the constitutional provisions and the acts of Congress enacted pursuant thereto, is to place the judgments of the federal courts upon an equal footing with those of the state courts, rather than to give the former an advantage or superiority over the latter.

The decisions of this court establish, without contradiction, the rule, that judgments and decrees of the circuit courts of the United States, sitting in a particular state, are to be accorded in the courts of that state such effect, only, as would be accorded, in similar circumstances, to the judgments and decrees of a state tribunal of equal authority. (*Dupasseur v. Rochereau*, 21 Wall., 130–135; *Crescent Live Stock Co. v. Butchers' Union*, 120 U. S., 146; *Pendleton v. Russell*, 144 U. S., 644; *Metcalf v. Watertown*, 153 U. S., 676; *Hancock National Bank v. Farnum*, 176 U. S., 645.)

In *Crescent Live Stock Co. v. Butchers' Union*, 120 U. S., 146–147, Mr. Justice MATHEWS in the opinion said:

"The question whether a state court has given due effect to a judgment of the United States, is a question arising under the constitution and laws of the United States, and comes within the jurisdiction of federal courts by proper process, although, as was said by this court in *Dupasseur v. Rochereau*, 21 Wall., 130–135: 'No higher sanctity or effect can be claimed for the judgment of the Circuit Court of the United States rendered in such a case, under such circumstances, than is due to the judgment of the state courts, in a like case and under similar circumstances.' *Embry v.*

Palmer, 107 U. S., 3. It may be conceded, then, that the judgments and decrees of the Circuit Court of the United States, sitting in a particular state, in the courts of the state are to be accorded such effect, and such effect only, as would be accorded, under similar circumstances, to the judgments and decrees of a state tribunal of equal authority."

In *Pendleton v. Russell*, 144 U. S., 644, Mr. Justice FIELD in the opinion said:

"It is well settled that the judgments and decrees of the Circuit Courts of the United States are to be accorded, in the state courts, the same effect as would be accorded to the judgments and decrees of a state tribunal of equal authority. It is within the jurisdiction of this court to consider and determine that question, that is, whether such effect was given in any particular case, whenever properly presented. But, in determining that question, this court must, in the first instance, consider whether the federal court had jurisdiction to render the judgment or decree, to which it is contended due effect was not given; for, as a matter of course, the jurisdiction of every court is open to inquiry, when its judgments and decrees are produced in the court of a state, and it is there sought to give them effect."

In *Metcalf v. Watertown*, 153 U. S., 676, Mr. Chief Justice FULLER in the opinion said:

"In *Dupasseur v. Rochereau*, 88 U. S., 21 Wall., 130, 135, Mr. Justice BRADLEY, speaking for the court, said: 'The only effect that can be justly claimed for a judgment in the circuit court of the United States, is such as would belong to judgments of the state courts rendered under similar circumstances;' and 'it is apparent, therefore, that no higher sanctity or effect can be claimed for the judgment of the circuit court of the United States rendered in such a case under such circumstances than is due to the judgments of the state courts in a like case and under similar circumstances.' The same views were expressed by the court through Mr. Justice MATHEWS in *Embry v. Palmer*, 107 U. S., 7, 9, 10; *Crescent City Live Stock L. & S. H. Co. v. Butchers'*

Union S. H. & L. S. L. Co., 120 U. S., 141, 146, 147. It can not be doubted that, in respect of their effect under section 905, the judgments and decrees of the circuit courts of the United States are entitled to the same sanctity and effect in the courts of each state, when those courts are held within the state, as their own judgments, nothing more but nothing less."

In *Hancock National Bank v. Farnum*, 176 U. S., 645, the opinion of the court being by Mr. Justice BREWER, it was held that a judgment of a circuit court of the United States must be given the same effect, in other states, that it is entitled to in the state in which it is rendered, and as if it were a judgment of a state tribunal of equal authority.

Under the settled rule of this court, persistently and repeatedly announced in the cases cited, the inquiry here is, whether the decree in equity, entered by the state court, accorded the same credit to the judgment at law, previously rendered in the circuit court of the United States, that it would have been entitled to receive if the same judgment, in similar circumstances, had been pronounced in a state court having like authority.

That the judgment of the state court fully meets the requirements of the above stated rule is manifest upon the face of the record, upon the opinion delivered by Judge Ames, and upon an examination of the judgments previously rendered by the same court, in cases involving pleas of *res adjudicata*, based upon judgments of the state courts. In the opinion delivered by Judge Ames (printed record, p. 131) it is said: "Is the judgment of the federal court *res adjudicata* and an estoppel of this suit? We think that, so far as this jurisdiction is concerned, whatever may be the law elsewhere, this court has conclusively answered this

question in the negative." This conclusion he derives from the rule established in Nebraska by the previous adjudications in the following cases cited by him in the opinion: *State v. Bank of Commerce*, 61 Neb., 29; *R. R. Co. v. Bigley*, 95 N. W. (Neb.), 345; *Pekin Plow Co. v. Wilson*, 92 N. W. (Neb.), 178; *Omaha v. Redick*, 61 Neb., 163; *Simons v. Fagan*, 62 Neb., 287; *Lansing v. Ins. Co.*, 93 N. W. (Neb.), 756. The opinion, so far from being a departure from the rules giving effect to the judgments of the courts of the state, is definitely rested upon prior authority defining the effect which, in like circumstances, is given to the judgments of the state courts. Thus, the judgment of the Circuit Court of the United States was, at the outset, definitely placed upon an equal footing with the judgments rendered by the state courts, in like circumstances, and the record shows a full compliance with the rule repeatedly announced by this court. We leave the review of the Nebraska cases for the discussion, hereafter presented, of the general principles of *res adjudicata* and election.

Apart from the principle involved in the plea of former adjudication, the case has no unusual features. The simple presentation of a bill in equity, for reformation of a contract, is an entirely usual proceeding, calling for the exercise of one of the *exclusive* powers of a court of equity; and is a proceeding that has heretofore received the sanction of this high court. This court has repeatedly held that the reformation of written contracts, for fraud or mistake, is an ordinary head of equity jurisdiction; and that this jurisdiction is applied, where necessary and proper, to the reformation of contracts of insurance. (*Hearne v. Marine Ins. Co.*, 20 Wall., 490; *Equitable Ins. Co. v. Hearne*, 20 Wall., 494; *Insurance Co. v. Wilkinson*, 13 Wall., 231; *Snell v. Insurance Co.*, 98 U.

S., 89; *Thompson v. Phoenix Ins. Co.*, 136 U. S., 295; *Walden v. Skinner*, 101 U. S., 583; *Moffett v. Rochester*, 178 U. S., 384.) And in *Simmons Creek Coal Co. v. Doran*, 142 U. S., 435, it was said by Mr. Chief Justice FULLER that equity courts exercise this jurisdiction, "where there is a *mutual* mis- or mistake on *one side*, and *fraud* or *inequitable conduct* on the other." The bill here shows, on its face, that it was drawn with reference to the rule just quoted. The same rule is accurately stated in 3 Pomeroy's Equity, section 1376, and had frequently been applied in the Nebraska Supreme Court (the forum in which this case was heard) in actions for reformation of insurance contracts. (*Home Fire Ins. Co. v. Gurney*, 56 Neb., 306; *Cook v. Westchester Fire Ins. Co.*, 60 Neb., 127; *Lansing v. Commercial Union Assur. Co.*, 93 N. W. (Neb.), 756.

With this preliminary definition of the question at issue, we shall endeavor to justify the holding of the state court upon principle and authority.

III.

1. Credit was not denied to the former judgment. The plea of res adjudicata is inadmissible in this case. The present suit in equity states a cause for reformation which the record in the first suit discloses was not then in issue.

2. The situation exhibited here by the pleadings and proofs shows merely that the attempt by the first suit to obtain redress failed because plaintiff there misconceived its remedy. The first suit was a misadventure, and the judgment rendered therein is not a bar to the prosecution of the only cause of action ever available to plaintiff.

3. The present suit and the facts pleaded in the present petition are not inconsistent with the position taken in the prior suit.

Plaintiff did not have the choice of two inconsistent remedies, the selection of one of which would destroy the other. It had but a single remedy. In the effort to obtain redress at law, it mistook the remedy, and invoked a mode of relief incompatible with the facts stated on the face of its own petition.

This is the situation of plaintiff. In the forum where the first suit was *instituted*, the courts of law applied the equitable doctrine of estoppel, and held that where the agent delivered a policy with knowledge beforehand of the existence of concurrent insurance on the same risk, and collected the premium, the company would be estopped to claim, after a loss, that it did not assent to the concurrent insurance. The knowledge of the agent was imputed to the company, and it was conclusively presumed to have assented to facts within its knowledge at the time it went into the venture, rather than to have deliberately accepted a consideration for putting forth a policy known at the time to be void. *Phenix Ins. Co. v. Covey*, 41 Neb., 724; *German American Ins. Co. v. Covey*, 41 Neb., 728; *Home Fire Ins. Co. v. Hammang*, 44 Neb., 566. All of these cases were decided long prior to the institution of the original suit at law, and they established the rule of the forum.

After the *change of forum*, upon a petition of removal, counsel examined the authorities to the same point to ascertain the rule obtaining in the federal court. There, as in Nebraska, it had previously been ruled by the circuit court of appeals of the eighth circuit that the doctrine of equitable estoppels, or estoppels *in pais*, might be successfully invoked against the company which had issued its policy with notice of other insurance, then subsisting. *Firemen's Fund Ins. Co. v. Norwood*, 16 C. C. A., 136. That court as then and now constituted, was the court of last resort in cases

where the sole ground of federal jurisdiction depended upon diverse citizenship. Its decisions were authoritative upon the district judge before whom the plaintiff's cause was pending. As authority for the decision of the Circuit Court of Appeals, the opinion referred to the decision of this court in *Insurance Company v. Wilkinson*, 13 Wall, 233, in which Mr. Justice MILLER, speaking for this court, said:

"It is precisely in such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppels or, as it is sometimes called, estoppels *in pais*. . . . It has been applied to the precise class of cases of the one before us in numerous well-considered judgments by the courts of this country. Indeed, the doctrine is so well understood, and so often enforced, that, if in the transaction we are now considering, Ball, the insurance agent who made out the application, had been in fact, the underwriter of the policy [as was Borgelt in the case at bar], no one would doubt its applicability to the present case."

It is elementary that the powers of equity are only to be called into action in those cases where the remedy at law is inadequate. (24 A. & E. Enc. of Law (2 ed.), p. 657.) At the time of instituting the suit at law, it appeared to be well settled in the forum where the suit was *instituted*, and in the forum to which it was *removed*, that the common law courts were adequate to afford relief under the facts of plaintiff's case as then pleaded, and as pleaded in the case at bar. By the application of the doctrine of estoppel, apparently approved by Mr. Justice MILLER, the common law courts in both jurisdictions accomplished the same result as that reached in equity by a decree correcting and reforming the contract. The effect of the adoption of this rule was, necessarily, to oust the court of equity of jurisdiction. As was said by NORVAL, J., in *Home Fire Ins. Co. v. Wood*, 50 Neb., 386, the policy "probably should have contained

an endorsement of the $2,000 prior insurance; but that it failed in this respect did not affect the rights of the insured, since the company at the time this risk was written had notice of the existence of such prior insurance." Apparently, then, upon the facts now pleaded, an action at law was not only the proper remedy, but was indeed, the exclusive and sole mode of redress. If a bill had been filed in the same forum, at that time, to obtain relief by correction of the policy, it must, on the authorities referred to, have been subject to demurrer, because, on the facts shown, the failure to endorse permission for concurrent insurance would have been immaterial and would not have operated to deprive plaintiff of its remedy at law.

Plaintiff's original pleading was drawn with reference to these authorities. It is a misstatement to assert that plaintiff sought to recover upon the policy *as written*. On the contrary, the extrinsic facts not shown upon the face of the policy, but nevertheless necessary to excuse the failure of plaintiff to comply with the stipulation prohibiting other insurance, were *substantive* and *necessary* elements of plaintiff's cause of action, and, as such, were embodied in his petition in the suit at law. In its original suit at law, plaintiff confessed that by the strict letter of the policy, it could not recover, and sought to avoid the provision prohibiting concurrent insurance, by facts pleaded extrinsic of the written instrument. The petition in the suit at law (printed record, p. 40) alleged:

"Plaintiff shortly prior to issuance of the aforesaid policy by defendant had procured a policy of insurance from the Firemen's Fund Insurance Company, incorporated under the laws of California, insuring it against loss by fire, of the same property in the sum of $1,500 for a term of two years, which insurance was then subsisting and remained in

force to and including the date of said fire. The fact of said subsisting insurance in said company was by H. J. Walsh, plaintiff's president, disclosed to defendant at and prior to the execution and delivery of its said policy and prior to payment by plaintiff of said premium therefor, and was so by him orally disclosed and communicated to defendant's recording agent at Lincoln, Nebraska, A. D. Borgelt, who then had full authority from defendant to countersign and issue its policies and accept fire insurance risks in its behalf and collect and receive therefor and who in fact accepted said risk and issued said policy, and collected and received said premium as such agent in behalf of defendant with knowledge beforehand of said concurrent insurance and with the intent knowingly to waive the condition of said policy that 'it shall be void if the insured now has or shall hereafter make or procure any other contract of insurance' on the property covered thereby. And by the aforesaid several acts and by procuring, receiving, accepting, and retaining of said insurance premium with knowledge of said subsisting concurrent insurance, the defendant has waived the said condition and is estopped to claim benefit thereof and is bound by its said policy notwithstanding said condition. Plaintiff had no insurance on said property except as before stated."

Again, after the answer had been filed, plaintiff pleaded a specific agreement of the parties that the policy sued on should be concurrent with the other insurance. From the reply in the suit at law we quote the following (printed record, pp. 53–54):

"The policy referred to in said answer, of $1500.00 in the Firemen's Fund Insurance Company, was, on the contrary, subsisting at and prior to the issuance by defendant to plaintiff of the policy, sued on herein, and was in fact issued December 12, 1895, for the term of three years, and the existence of such policy, on the same property covered by defendant's policy, was personally well known to A. D. Borgelt, defendant's recording agent who wrote said policy and accepted said risk, and who then had full charge of defendant's agency at Lincoln, Nebraska, with authority to

accept fire insurance risks for and on defendant's behalf, to countersign and issue its policies of insurance, and to collect and receive the premiums therefor. And at and prior to his acceptance of said risk and issuance of the policy sued on, the plaintiff's president, H. J. Walsh, reported orally to said A. D. Borgelt, the fact of such subsisting insurance of $1500.00; and said Borgelt as such agent, with full knowledge of said fact, accepted the risk and wrote, executed and delivered said policy to defendant, with the intent on the part of both plaintiff and defendant that the same should be concurrent with the said subsisting insurance and not avoided or affected thereby, and with purpose and intent of defendant knowingly to waive and forego all benefit of the provisions of said policy set forth in the defendant's answer; and in faith thereof and with the sole purpose to procure such insurance to be concurrent with the said subsisting insurance, and not otherwise, the plaintiff paid, and the defendant procured and received the premium therefor."

Nothing can be plainer, on the face of the record, than that the plaintiff, in the prior suit at law, grounded its right to relief upon these additional facts pleaded, outside of the conditions written in the instrument itself; and that it sought to maintain its action, not upon the letter of the policy, but by virtue of the equitable estoppel which it pleaded, and which was then thought to be available in an action at law. It turned out that plaintiff's faith in the precedents mentioned was misplaced. The lower courts upheld its contention but in the extraordinary proceedings by *certiorari*, this court held that the rule of equitable estoppel was not admissible in such cases, and that courts of common law jurisdiction were powerless to afford relief based upon these extrinsic facts shown outside of the written instrument. For the purposes of this case, it is now determined judicially, by a judgment which is conclusive on all parties to the record, that plaintiff never had a remedy at law. His sole means of

redress is by an appropriate suit in equity, where he may have the written instrument corrected so as to express the agreement actually made by the parties. The former adjudication is, not that plaintiff has elected another remedy, available to him, but that in the prosecution of the suit at law, he mistook his remedy. His prior suit was a mere misadventure, resulting in an adjudication that the facts pleaded and relied upon, outside of the written instrument, were not admissible or available to him in an action at law. It remains to notice whether on such a record, the adjudication precludes plaintiff from resorting to the only remedy which ever was available to it; whether the former misadventure, or mistake as to what was its remedy, will deprive plaintiff of the right to have an adjudication in any forum upon the merits of its cause; and whether or not the wrong of which plaintiff complains has any redress, in any form of action or in any forum.

The foregoing brief statement of the plaintiff's situation shows the applicability to the case of the points stated in the headnotes. The courts and textwriters have so intermingled the doctrine of *res adjudicata*, and election of remedies, that they may properly be presented together. Indeed, the effect of a former adjudication as an election is generally discussed as one branch of the law of *res adjudicata*.

The present record does not present a case for the application of the doctrine of election, because the plaintiff did not have a choice of remedies. There was but one remedy open, and this was misconceived. It is not a case where the courts of law and equity had *concurrent* jurisdiction. The incidental and specific relief by reformation, necessary to the maintenance of any action upon the facts pleaded in both suits, could only be given in *chancery*. The

rule of *equitable estoppel*, under which the plaintiff sought relief through the machinery of the *law*, was held not to subsist, and relief at law was denied for want of power, in that forum, to take cognizance of a case for relief, upon equitable grounds, contrary to the letter of the written contract. The peculiar facts alleged rendered the law court incompetent to determine that question, even with the facts all settled in plaintiff's favor. The final ruling was as if a demurrer had been sustained to the petition, for want of jurisdiction of the court of law over the subject matter. It is clear, on principle and authority, that in such a case the doctrines of election and *res judicata* do not apply.

In *Peters v. Bain*, 133 U. S., 670–697, Mr. Chief Justice FULLER thus defines the term election:

"The doctrine of election rests upon the principle that he who seeks equity must do it, and means, as the term is ordinarily used, that where two *inconsistent* or alternative rights or claims are presented to the choice of a party by a person who manifests the clear intention that he should not enjoy both, then he must accept or reject one or the other."

In 7 Enc. Pl. and Pr., p. 366, under the title "Election of Remedies," it is said in the text:

"If the suitor has in his first action mistaken his remedy and adopted a mode of redress incompatible with the facts of his case, and is defeated on that ground, he is still free to elect and proceed anew."

The doctrine of election, as applied and defined in the above quotations from Mr. Chief Justice FULLER and from the Encyclopedia of Pleading and Practice, accords with the holdings of Nebraska, where the suit was tried, in an unbroken line of decisions. (*State v. Bank of Commerce*, 61 Neb., 25; *Omaha v. Redick*, 61 Neb., 163–166; *Simons v.*

Fagan, 62 Neb., 287–295; *Gayer v. Parker*, 24 Neb., 643; *Pekin Plow Co. v. Wilson*, 92 N. W., 178; *C. B. & Q. R. Co. v. Bigley*, 95 N. W., 344; *Pinkham v. Pinkham*, 60 Neb., 600; *Lansing v. Commercial Union Assur. Co.*, 93 N. W., 756–760).

In *State v. Bank of Commerce*, 61 Neb., 25, SULLIVAN, C. J., said:

"Before a case can arise for the application of the principle of election, there must be (1) two co-existing remedies; and (2) those remedies must be so inconsistent that a party can not logically choose one without renouncing the other. Apt illustration of the rule is found in some of the cases cited by counsel for appellants, in which it is held that one who has sued on the theory that an unauthorized act done in his name has been ratified, can not afterwards maintain an action on the theory that such act and the assumed agency of the person by whom it was performed, have been repudiated. . . . In the present case there never was but one remedy of which the appellee could avail itself. Its officers thought otherwise, and perhaps they think so still, but that does not change the fact nor alter in any way the rights of these litigants. One is not precluded from resorting to a remedy which the law gives him, because he has attempted to avail himself of one to which he was not entitled. It is not enough that he supposed he had two remedies and that he acts upon that supposition. He must have them in fact."

In *Pekin Plow Company v. Wilson*, 92 N. W. (Neb.), 178, it was said in the opinion by Commissioner OLDHAM:

"An examination of a long line of authorities submitted by the learned counsel for each of these litigants leads us to the conclusion that the doctrine of election of remedies only applies when a party, who actually has at hand two inconsistent remedies, and with full knowledge of such fact, proceeds to enforce one of these remedies, he is bound by such election. But if in his first action he had adopted a mode of redress incompatible with the facts in his case, and was defeated on that ground, he is still free to proceed anew,

or, as said by this court in State v. Bank of Commerce, 84 N. W., 406, 'If the law gives but one remedy to a party, he is not precluded from resorting to that because he has attempted to avail himself of another to which he is not entitled.' The rule seems to be well set forth in 7 Enc. Pl. & Prac., 366, as follows: 'If in attempting and designing to make an election, one puts forth an act or commences an action in ignorance of substantial facts which proffer an alternate remedy, and the knowledge of which is essential to an intelligent choice of procedure, his act or action is not binding. He may, when informed, adopt a different remedy.' This doctrine seems to be supported by the holdings of this court in State v. Bank of Commerce, supra, and City of Omaha v. Redick, 85 N. W., 46; and also in Kittredge v. Holt, 58 N. H., 191; Nysewander v. Lowman (Ind. Sup.) 24 N. E., 355; Kraus v. Thompson, (Minn.) 14 N. W., 266, 44 Am. Rep., 182; Parmalee v. Adolph, 28 Ohio St., 10; Bank v. Bozeman, 13 Ark., 631. It is plain that, on plaintiffs theory of the case, its original petition was filed in ignorance of a material fact connected with its contract with Parks, and that, if it had prosecuted its original petition to judgment, it could not have recovered anything, because founded on a mistaken idea as to the conditions contained in the contract of sale of the goods. It had no contract with Parks which gave it a lien upon the goods in controversy; hence by the filing of its original petition and affidavit it never attempted to enforce one of two inconsistent remedies which it had against him. Hence we conclude that the filing of the original petition and affidavit in replevin was not an election of remedies, and that the learned trial court erred in directing the jury to find for defendant."

In *Chicago, B. & Q. R. Co. v. Bigley*, 95 N. W. (Neb.), 345, Judge SEDGWICK in the opinion said:

"In pursuing the action in the name of the administrator, so far as it was for her use, she was attempting to enforce a claim which was already barred, and was pursuing an action which must result in her defeat therein, as the event shows. In Burch v. Grave, 12 N. E., 514, the supreme court of Indiana says: 'A party who imagines he has two or more

remedies, but who misconceives his rights, is not to be deprived of all remedy, because he first tries a wrong one. . . . Justice ought not to be wholly denied because she mistook her remedy in the first place.' We think this language correctly states the law, and is in point upon the contention of the plaintiff in error, and is supported by the cases cited, as well as other authorities. . . . In commencing the prior action for damages through the instrumentality of the administrator, she was claiming a right of action which did not exist to her, and was seeking to enforce a remedy which before that time had been wholly done away with. Her mistake in so doing could not affect her right to benefit from the relief fund, which had before that time become fixed."

Pinkham v. Pinkham, 60 Neb., 600–613, though not identical, is analogous in principle to the present suit. The suit had originally proceeded to trial on an issue to test the validity and construction of a deed according to its terms. On a hearing in the supreme court (55 Neb., 729), it had been ruled that the instrument was testamentary in character, and passed no present estate. After the reversal of a judgment in the lower court quieting a title created by the deed, the appellee, who had been beaten on the issue as to the validity of the deed according to its terms, filed an amended bill, seeking reformation by so altering the terms of the deed as to create a present estate. He had judgment in his favor on the amended bill. In holding against the contention urged in the supreme court on the last hearing, that the issue as to whether any estate was created under the deed was *res adjudicata*, Judge HOLCOMB, speaking for the court, said:

"It is to be observed that the amendment made is consistent with the position of the appellee during all the proceedings had in the case. Nor does it conflict with, nor seek to overthrow, the conclusions reached in the first opinion filed. He has been, during the entire proceedings, claiming

the land in controversy by virtue of the instrument as a deed of conveyance of the land, and not as a testamentary right of the grantor. When this court found that by its wording, although in form a deed, it was testamentary in character, and passed no present estate, the appellee alleged mistake in its drafting, and prayed for a reformation to conform to the alleged intention of the parties, such action being in harmony with his contention during the whole course of litigation."

In *Omaha v. Redick*, 61 Neb., 163–166, Judge NORVAL defines the limitations of the rules of *res adjudicata* and election with an accuracy that can not be mistaken or misunderstood. The case under consideration was by the former owner of real estate to recover the value of a strip of ground constituting a portion of Harney Street in the City of Omaha. Plaintiff had conveyed the land to the City in 1876, through a mistake of fact, and in faith of the representation of a third party that the city had contracted to then grade and improve the street. Soon after the making of the original conveyance and in 1877 or 1878, the same plaintiff sued the City to recover the value of the property. In the first suit, judgment was for the defendant. After the termination of that suit, the same plaintiff sued in equity and obtained a cancellation of his original conveyance to the City. After obtaining this relief in equity, the second suit at law against the City for damages in the amount of the value of the property was instituted. It will be seen that the prior judgment in favor of the City was rendered upon a petition attempting to obtain the same identical relief that was sought in the suit then under consideration by the court. Disposing of the pleas of former adjudication and election of remedies, Judge NORVAL said:

"The argument is untenable for the reason that he did not in 1876 have a choice of remedies. No action for value would

lie, there being no express nor implied obligation on its part to pay for the property. His only remedy was a suit to set aside the deed. . . . The last point made is that the issues involved in this case are identical with those in the action commenced in 1877, and the judgment in that action is a bar to this. With this we can not agree. He had no right of action in 1877 for either value or damages. In bringing that action he merely mistook his remedy. Wherefore judgment in that case could not preclude him from bringing an action when his cause of action subsequently accrued. *State v. Bank of Commerce of Grand Island*, 61 Neb., 22."

Simons v. Fagan, 62 Neb., 287–295, was a suit upon an attachment bond to recover the damages sustained by reason of the suing out of the attachment, after the attachment had been dissolved. The answer pleaded as a defense that the same plaintiff had elected to redress the grievances which he had suffered, arising out of said suit, by instituting an action against the defendants for malicious attachment. The prior suit had been commenced in the same court where this suit was instituted and had been removed to the United States Circuit Court for the district of Nebraska, where there was a verdict and judgment in favor of defendants. This judgment was also pleaded as a bar to the second suit. In the opinion holding these defenses to be inadmissible, it was said:

"It is well established that in order to make the former action a bar, the circumstances must be such that the plaintiff might recover in the first action for the same cause of action alleged in the second. It is not enough that the transaction involved in and giving rise to the two actions are the same. Stowell v. Chamberlain, 60 N. Y., 272. In the case cited the plaintiff brought an action against the defendant for the wrongful conversion of bonds which he alleged he had loaned to him. Judgment was rendered in favor of the defendant, when another action to recover the value of the

bonds was brought, the allegations of the petition being that the defendant sold the bonds as plaintiff's agent, but had failed to account for the proceeds. The former judgment was pleaded as a bar to the action. The court held that the same evidence would not sustain both actions and that the former was not a bar. The case was approved by this court in Gayer v. Parker, 24 Neb., 643."

In *Gayer v. Parker*, 24 Neb., 643, the report shows that one Wiswell procured from the plaintiff 12,000 feet of lumber for a temporary purpose, with an option either to purchase at a price stated or to return the lumber and pay $2 per thousand for its use. Wiswell left the lumber upon the premises of defendant, who thereupon made use of it. The form of the action under consideration in the reported case was conversion. Before bringing this suit, however, plaintiff had prosecuted a former suit to adverse judgment to recover from the same defendant the value of the lumber "for goods sold and delivered." The former judgment was pleaded in bar. In a well considered opinion delivered by Judge Maxwell, the second suit was held to be maintainable and a judgment in favor of plaintiff was affirmed.

Lansing v. Commercial Union Assur. Co., 93 N. W. (Neb.), 756–760, presented a situation in many respects similar to that shown in the present suit. The policy, covering the Oriental Hotel, was issued to the estate of W. C. Heddleson, but the property was known by the agent to be owned by Mary E. Fuller. The policy also described the property as in the wrong block. Fuller in her lifetime brought an action upon the policy, in which she specifically pleaded that she was "the sole owner of the property and that the policy was issued for her sole use and benefit." When about to meet defeat in that action, because she was not the beneficiary named in the policy, she began an independent suit in equity

to correct the policy. It was urged by the company, in defense, that by instituting the prior action *in form upon the policy*, the plaintiff had elected her remedy, and was precluded from asserting a right to correct the policy by a decree in equity; and the case of *Washburn v. Great Western Ins. Co.*, 114 Mass., 175, was cited as a precedent for the contention. In the opinion (p. 758) it is said:

"The contention that the petition is insufficient seems to be based upon the fact that the petition shows that the action at law had already been brought upon the policy of insurance, and was still pending, and that this constituted an election to sue at law upon the policy as *written*, rather than to institute a suit in equity for the *reformation* of the policy. This contention, we think, can not be sustained. The two proceedings are not in any sense inconsistent. It is quite probable that appellee could not have recovered on the policy in question in an action at law without first procuring a reformation of the instrument. He, therefore, had a right to institute his equitable proceeding to procure a reformation, and making the policy conform to the mutual intention of the parties. There can be no doubt that, under the practice in this state, appellee might have filed an amended petition asking for a reformation of the policy, and for a judgment thereon as reformed. But this must have been addressed to the equity side of the court, and would not differ essentially from what we now have in the case at bar. The contention that appellee, in bringing the action at law, elected to treat the policy *valid as written* can not be sustained. An examination of the petition filed in the action at law discloses that Mary F. Fuller pleaded that she was the sole owner of the property, and that the policy issued was issued for her sole use and benefit, so that the position of appellee has not been changed during the progress of the litigation in any material particular. Appellant has not changed its position, waived any of its rights, or been put in any worse position by the fact that appellee instituted this suit in equity to procure a reformation of the policy and a judgment thereon in the same proceeding. Nor has appellant in any way been prejudiced by the fact that ap-

pellee's testate commenced an action at law, inasmuch as the trial court taxed the costs of that action to appellee. In this case, appellee's testate did not seek to proceed with her action at law when confronted with the answer filed by appellant, but a suit in equity was instituted asking to have the action at law stayed until there could be obtained a reformation of the policy, and that the two proceedings be consolidated, and a judgment entered for the amount found due on the policy after reformation. It is thus very apparent that the doctrine of the election of remedies can have no application to the facts in this controversy. Appellant cites, in support of its contention, *Washburn v. Great Western Insurance Company*, 114 Mass., 175. It was there held: 'One who filed a bill in equity to reform a policy of insurance by striking out a clause of warranty, and who afterwards begins an action at law upon the policy *as written*, alleging compliance with the warranty, and after a trial upon that issue has judgment rendered against him, has elected his remedy and waived his right to prosecute further his bill for the reformation of the policy.' The case, we think, is distinguishable from that in hand. In that case, after an adverse decision upon the claim *that he had complied with the clause of warranty*, the plaintiff sought to prosecute his abandoned equity suit in order to show that he had never agreed to the provisions contained in the warranty. Manifestly, in fairness, he could not be permitted to do this. His conduct was clearly calculated to mislead and prejudice the defendant. He could not be permitted to say that he had complied with the warranty, and should therefore recover, until he found out that he had not complied therewith and decision was rendered against him upon that claim, and then in another action seek to show that he had never agreed to the warranty. In the case at bar, on the contrary, the pleadings in the two proceedings are clearly made dependent upon and auxiliary to each other. In the equity suit it is sought to have the law action stayed until the policy in a proper proceeding could be made to conform to the facts—*not facts contrary to, but in harmony with those clearly disclosed in the petition in the law action.* Neither appellee nor his testate at any time sought to base a recovery upon facts materially different from those alleged and found by the trial court to be true in the equity suit. It is therefore apparent

that the case cited does not govern the case at bar. It follows that the contention that the petition in equity failed to state facts entitling appellee to equitable relief can not be sustained."

In our examination of this case, we have not overlooked the statement found in paragraph 3 of the syllabus that a party can not adopt one theory of his case, proceed to judgment thereon, and, if such judgment is adverse, relitigate his case upon a new theory. In the final analysis of the case, however, we find the test as to whether the former proceeding shall be held to be an election to depend upon the principles announced in the other Nebraska cases, to which we have referred. The holding is that before the prior proceeding can be held to preclude the plaintiff from suing over, it must appear that the two remedies invoked are inconsistent. In this case they were held not to be inconsistent, because in the petition at law it was alleged that the policy was issued for the sole benefit of the plaintiff who was owner of the insured property. It was upon that same theory that relief in equity was sought after it had been made to appear that the suit at law could not be maintained upon the instrument *as written*.

It is conceded that a suit in chancery, to enforce an independent equity, may be brought in the *first* instance, without resort to the law forum. It is shown by *Lansing's case* that such a suit may be brought *pending* an action at law. In a New Jersey case, hereafter noted, it was held that such suit could be brought *after* a final judgment at law, enforcing the contract as written. A suit in chancery to enforce an independent equity, and which proposes to try a question which could not be litigated at law (quoting from Chief Justice MARSHALL), "May be brought before commencement of a suit

...Ia., pending such suit, or after its decision by the highest ...ow tribunal." (*Parker v. Judges*, 12 Wheat., 561.)

The circumstance that the suit at law in the Nebraska case last cited had not proceeded to final judgment, is unimportant, as to its effect as an election of remedies. The finality and conclusiveness of an election does not in any case depend upon the judgment of a court. A principal who ratifies the unauthorized act of his agent by unmistakable conduct of any character, is bound by his election, even though he never begin suit, and has never prosecuted an action to judgment. In Bishop on Contracts, sec. 808, it is said, respecting the rights of a party who has once made an election: "After his choice is made and by words or by acts expressed in a manner suited to the particular case, he can not reverse it; he is said to have elected the one step and waived the other."

As authority for the point that the institution, or the prosecution of a suit to judgment, is not an essential or decisive fact in determining the applicability of the doctrine of election, as the law is administered in the forum where this suit was tried, we refer again to *C., B. & Q. R. Co. v. Bigley*, 95 N. W. (Neb.), 344. There a widow, whose husband had been a member of the Burlington relief department, under a rule that acceptance of relief barred a right of action against the road for damages for causing death, had accepted $50 from the relief department, the total death benefit being $750. Without bringing any action or attempting to enforce her claim against the relief department, she sued the road to recover damages for its negligence in causing her husband's death. The receipt of a partial payment of $50 from the relief fund was held to constitute an election, in a case where she clearly had two alternative rights, a selection of either

of which, by the terms of the certificate of membership, expressly barred the other. Strictly speaking, election is the *manifestation of a choice* between two inconsistent remedies. In such case, a choice of one remedy necessarily renounces the other. In cases for the application of the doctrine of election, the fact of instituting an action and prosecuting it to judgment is merely evidence that the party himself has chosen to pursue one remedy and to renounce the other. The same fact may be proved by other evidence equally credible, showing the manifestation of a like choice. In *Lansing's case*, therefore, the fact that the suit was not prosecuted to final judgment is wholly immaterial, because the *institution of the suit* would have been *the manifestation of a choice* of remedies, if the facts of his case had shown that he had two inconsistent remedies open to his choice. The judgment entered in his favor is of necessity a holding that his error, or misadventure, in first seeking an enforcement of the policy *as written*, was not a bar to the prosecution of his suit in equity, where the policy could be reformed and a judgment rendered in his favor thereon. *Lansing's case* is, therefore, a flat precedent in the Nebraska court for the maintenance of the present suit, and, if followed, the pleas of former adjudication and election must be held inapplicable to the case made on the present record.

Upon the foregoing authorities it is idle to assert that the Nebraska court, in the proceedings shown on this record, discriminated against the judgment of the United States Circuit Court. The judgment of the latter court was placed on an equal footing with the judgments of the state courts; and by the rules applied to the judgments of the state courts, in similar circumstances, it was held that, giving it full faith and credit, it was not a prior adjudication of the cause of action for reformation, and did not preclude a recovery on the policy

after reformation had been accomplished by decree in equity. To properly conclude the review of the Nebraska holdings upon the question at issue we quote the conclusions reached in the case at bar, upon presentation of very extended arguments (printed record, pp. 131, 132).

"Is the judgment of the Federal court *res adjudicata* and an estoppel to the prosecution of this suit? We think that so far as this jurisdiction is concerned, whatever may be the law elsewhere, this court has conclusively answered this question in the negative. When the plaintiff began the former action it supposed, as is shown by testimony of its counsel preserved in the record, and moreover was bound to suppose, not only that an action at law on the contract with pleading and proof of oral waiver of the stipulation for forfeiture, was a proper and adequate remedy for the recovery of its loss, but that, because it was so, a suit in equity to obtain a vain and unnecessary reformation of the contract would not lie. *Insurance Co. v. Norwood*, 16 C. C. A., 136; *Home Fire Insurance Company v. Wood*, 50 Neb., 386.

"The plaintiff began its action and prosecuted it to final judgment in reliance upon and in strict conformity with these decisions, the former of which was justified, as the court pronouncing it thought, by the opinion of the Supreme Court of the United States in *Insurance Company v. Wilkinson*, 13 Wall., 233.

"To say now that the plaintiff is estopped because it failed in the first instance, to take its cause into a forum whose doors were, to all appearances, firmly and finally bolted and barred against it, would not fall short of a mockery of justice. The language of this court in State v. Bank of Commerce, 61 Neb., 29, is strictly applicable to the present situation. 'One is not precluded from a remedy which the law gives him, because he has attempted to avail himself of one to which he is not entitled.' More especially must this be true if the remedy, to which he first makes unavailing resort, is one which has been expressly and exclusively sanctioned by the very tribunals to which he makes application for it. The same doctrine was reannounced by this court in *R. R.*

Co. v. Bigley, 95 N. W. R., 345, approving and adopting the language of the supreme court of Indiana in *Burch v. Grace*, 12 N. E. R., 514. 'A party who imagines he has two or more remedies, but who misconceives his rights, is not to be deprived of all remedy because he first tries a wrong one; . . . justice ought not to be wholly denied because she mistook her remedy in the first place.' Nor, it may be well to add, because the first and only really prejudicial and misleading error, if it was an error, which we must doubt, was not made by the litigant, but by the ministers of justice themselves. To the same effect are *Pekin Plow Co. v. Wilson*, 92 N. W. R. (Neb.), 178; *Omaha v. Redick*, 61 Neb., 163; *Simons v. Fagan*, 62 Neb., 287; *Lansing v. Insurance Co.*, 93 N. W. R. (Neb.), 756.

"The former suit was not inconsistent with this, but in that case the plaintiff sought to treat the contract as having been, in effect, reformed by the circumstances of its execution, which it was claimed waived or annulled one of its covenants. The Supreme Court held, and in practical effect it held nothing more, that the supposed reformation had not been accomplished. Thereupon the plaintiff resorted to this suit to secure its accomplishment, and for his right so to do he may quote no less authority than Mr. Chief Justice Marshall, who in Parker v. Judges, 12 Wheat., 561, says that one who proposes to 'try a question entirely new, which has not been and could not be litigated at law, may do so before the commencement of a suit at law, pending such suit, or after its decision by the highest law tribunal.'" (*Grandview Bldg. Assn. v. Northern Assur. Co.*, 102 N. W. (Neb.), 248.)

The above quotation from the opinion in this case, presents a strong argument in favor of the rule held in the state court. Taken in connection with the syllabus of the points decided, which by rule of this court is prepared by the court, it also demonstrates that the judgment rests solely upon the proposition that the plea of *res adjudicata* is inadmissible, because the subject matter of the present suit was not within the issues in the former suit at law, and because that forum did not have cognizance of a case requiring exercise of one of the

exclusive powers of equity. The decisions of the state court, upon this question, show painstaking research, and are based upon very high authority. We shall now endeavor to show that they are in harmony with sound principle, and with the well considered judgments of the courts of the country, including those of this court.

The holding of the state court is in harmony with the rule of this court, and rests in part, on one of the opinions of this court delivered by the greatest of its great jurists.

An independent equitable right, for enforcement of which equity is the exclusive forum, can not be concluded by a judgment at law.

Equity courts are not precluded from entertaining suits to enforce independent equities, because of prior abortive resorts to courts of law. The settled rule is directly to the contrary. A suit to try a question which could not be litigated at law, may be brought before the commencement of a suit at law, pending such suit, or after its decision by the highest law tribunal.

The rules just stated form the bases upon which the judgment of the state court rests; and they are sustained by the judgments of this court.

Parker v. Judges, 12 Wheat. (U. S.), 561, was an application for a mandamus to compel the issuance of an execution upon judgments rendered in the circuit court of Maryland in an action at law. After rendition of the original judgment and pending proceedings in error prosecuted to the United States Supreme Court, an injunction had been obtained to stay the proceedings at law on the judgment. The opinion was delivered by Mr. Chief Justice MARSHALL. He said (pp. 563–564):

"It is contended that an injunction could not be awarded, while the record was before this court on the writ of error. We do not think this a valid objection. The suit in chancery does not draw into question the judgment and proceedings at law, or claim a right to revise them. It sets up an equity independent of the judgment, which admits the validity of that judgment, but suggests reasons why the party who has obtained it ought not to avail himself of it. It proposes to try a question entirely new, which has not been and could not be litigated at law. It may be brought before the commencement of a suit at law, pending such suit, or after its decision by the highest law tribunal. The bill is an original bill, and may be filed, although an injunction should not be awarded. The injunction arrests proceedings at law, and may be dissolved or continued without making any final decree in the case. The condition of the suit at law may be a reason for imposing terms on the party who applies for an injunction, but can be no reason for refusing it. The subpoena and injunction act on the person to whom they are directed, not on the record, and it can be of no consequence where the record is."

In *Smith v. McIver*, 9 Wheat., 532, 537, Mr. Chief Justice MARSHALL, in holding that a court of equity is bound by the judgment of a court of law, distinctly expressed the qualification that it must appear that the case was one where the courts of equity and law have *concurrent* jurisdiction. This expressed qualification will necessarily exclude the application of the rule to a suit in equity for reformation, over which equity has the *exclusive* jurisdiction. The opinion of Mr. Chief Justice MARSHALL in this case, which was one in which courts of equity and law had concurrent jurisdiction, concludes: "A question decided at law can not be reviewed in a court of equity *without the suggestion of some equitable circumstance of which the party could not avail himself at law.*" The necessary inference from this qualification is that a court of law can not conclude a court of equity upon any

matter (including right to decree reformation) over which the equity court has exclusive cognizance.

In *Tilton v. Cofield*, 93 U. S., 167, this court applied the rule that courts of equity have no appellate powers over the judgments of courts of law. This rule was applied, however, to a suit in which the matters in issue, according to the opinion, "were no more open to inquiry in a court of equity than in another and independent *legal* forum." In the opinion, however, the court distinctly asserted the paramount authority of equity in those matters within its *exclusive* cognizance; and Mr. Justice SWAYNE announced the general rule with the following qualification: "Nor can a court of equity turn itself into a court of review, and correct the errors of a court of law. . . . Each is independent of the other. They act on different principles, and, *except where some recognized ground of equity jurisdiction is concerned*, are each alike bound to recognize the validity and conclusiveness of what the other has done. Equity in such cases does not contradict, but supplements. It does in this way what right and justice require, and what, from the inflexibility of the principles upon which a court of law proceeds, it could not do."

Phelps v. Harris, 101 U. S., 370–383, was a suit in ejectment. Plaintiff had previously sued in equity to quiet his title. In the equity suit the question of title was brought into question, the decree of the equity court being as follows:

"The court being of opinion that the complainants are not entitled to the relief prayed for in their prayer, or to any relief in the premises from this court, it is, therefore, ordered, adjudged, and decreed that the said complainants' bill of complaint be and the same is dismissed, and that complainants pay the costs."

The opinion of the supreme court of Mississippi, where the equity case was reviewed, discussed the question of the

validity of defendant's title, but the discussion appeared to have been for the purpose of showing that the title of defendant was not so void of validity as to constitute a mere cloud, and that consequently the case was not one of equitable cognizance. In holding that the plaintiff was not concluded by the decree in the equity suit, Mr. Justice BRADLEY said in the opinion (101 U. S., 376):

"We think, therefore, that the court below was right in determining that the decree in the equity case did not render the main controversy *res adjudicata*, but only decided that the bill would not lie; in other words, that it was not a proper case for a court of equity to determine the rights of the parties."

McComb v. Frink, 149 U. S., 629–644, was a suit in equity to establish a trust and for the recovery of the money found due from the trustee on an accounting. Previous to that suit, the plaintiff had prosecuted to final judgment an action at law against the defendant for breach of a contract to invest the same moneys, which were the subject of the trust in the equity suit. The suit at law was prosecuted to the supreme court of Massachusetts. In the subsequent suit in equity, the former adjudication was pleaded as an estoppel. In the opinion delivered by Mr. Justice BREWER, it is said:

"So the case (at law previously prosecuted), as finally determined, was simply one at law for breach of a contract to invest in the stock of the Southern Railroad Association. This mere recital of the facts concerning that action at law seems sufficient answer to the plea of *res judicata*, for among the essentials of an estoppel by judgment is identity of the cause of action. *Atchison, T. & S. F. R. Co. v. Jefferson County Comrs.*, 12 Kan., 127; 2 Bouvier Law. Dict. title *Res Judicata*. When an action at law for breach of a contract to invest in stocks fails because the testimony develops that the investment was made and a declaration of trust given in respect to the stock so purchased, it would seem strange

to hold that such judgment is a bar to a suit in equity for a breach of the trust, especially when it appears from the records in the law case that an application to change the declaration into a bill in equity in respect to the trust was denied. As was said in *Cromwell v. Sac County*, 94 U. S., 351–353 (24; 195, 198): 'In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been litigated and determined. Only upon such matters is the judgment conclusive in another action.' What might have been determined in the Massachusetts court if the amendment of the declaration had been permitted can only be conjectured; what was determined was that no such contract as charged existed, or if it existed, was broken. Copious extracts were in evidence in this case from the brief of the defendant's counsel in the Massachusetts case, which show that the defense relied upon was that no action at law could be maintained in consequence of the disclosure of the trust receipt. It is enough to quote these, which are but samples of others:

"'It is, of course, unnecessary to give any consideration to the "trust receipt," except as it disproves the agreement alleged, because—

"'(1) It is not the contract alleged and declared on and for breach of which money is sought.

"'(2) Because its only scope and effect is to create a trust, for the enforcement of which no action of law can be brought, but only a remedy sought in equity.'

"'It becomes wholly unnecessary, as it is entirely impracticable, to inquire, consider, or determine what anybody's rights may be under the trust created or declared on in this transaction.

"'When, if ever, a bill in equity shall be brought, and all parties in interest brought into court, that may be an interesting as it will be a necessary question. Till then it is

The insurance company issued a policy of insurance of $25,000 to the Rubber Company, distributed among several items of property, under an agreement between the parties, not embodied in the policy, that the Rubber Company should procure from other insurers policies upon the same property to the amount of at least $75,000, which should be concurrent and proportionate with the policy which it issued. It was contemplated that the policies should be procured simultaneously with the policy in controversy so that they would limit the responsibility of the company issuing the policy in question to one-fourth of the loss happening to any item of the insured property. The insured failed to carry out its agreement, which rested in parol, and was not carried into the policy. A warehouse was burned, of the value of $5,000, and it turned out that the policy mentioned was the only insurance upon that particular subject. The policy, as written, contained a clause that other concurrent insurance was permitted without notice, but contained no other provision as to concurrent insurance. After the loss, the company canceled its policy, and returned pro rata the unearned premium on the full amount of the insurance. It also offered to pay the assured its proportionate share of the loss upon the warehouse in question, according to the understanding of the parties in reference to the procuring of other insurance. The assured refused the offer and brought suit at law.

While the suit at law was pending, the company sued in equity, offering to pay its proportionate amount of the loss, and sought to enjoin suit on the policy, and to reform the policy to conform to the agreement under which it was issued. At the hearing on the application for a preliminary injunction, the insurance company, complainant in the equity suit, was not prepared to admit legal liability on the policy, but claimed to have legal defenses to the action at law out-

side of the facts represented as the basis for equitable relief, and for this reason, instead of allowing the injunction, the chancellor ordered that the application stand over till after the trial of the action at law. The insurance company presented as a defense to the action at law the defenses which it refused to relinquish at the time it sought by injunction to have the equity court restrain the prosecution of the law action. The trial in the action at law resulted in a verdict and judgment against the insurance company for the full sum claimed. This judgment was affirmed in the court of errors and appeals (46 Atl., 777). The rule of liability in the law forum applied against the insurance company was thus stated in the opinion:

"Clearly, the defendant could not assert a right to the premium for valid insurance, and at the same time insist that the insurance had never been effective. By claiming and maintaining such a right, with full knowledge of all material circumstances, it unequivocally affirmed the validity of the insurance for the period covered by the premium, and definitely waived every objection on which its validity could be denied."

After the termination of the suit at law by the highest court of errors and appeals of the state, the insurance company presented a supplemental bill in the suit in chancery, showing that its efforts to defend in the suit at law had been futile, and that judgment had gone against it for the full sum, and renewed its application for an injunction until the equity suit could be heard, and prayed for the establishment and enforcement of the independent contract, which, in effect, made the Rubber Company co-insurers with it to the extent of three-fourths of the amount at risk. The chancellor denied relief, and sustained a demurrer to the amended bill, holding the former judgment to be conclusive on the merits. The court of errors and appeals reversed the

chancellor. In an opinion of great force and ability (*Commercial Union Assur. Co. v. New Jersey Rubber Co.*, 51 Atl., 451–454), it was said:

"This brief rehearsal demonstrates more satisfactorily than any mere argument could that, in its disposition of the complainant's case, the court of chancery followed the concrete ruling of the court of law, without noting the distinction therein made between the policy of insurance and the contract between the parties. Mr. Justice Dixon, in the opinion above cited, made it perfectly clear that the contract between the parties was not the policy of insurance. The substantial contract, he declared, was a bilateral one, in which each of the parties was an actor, and that, while the complainant's policy was contemplated as a factor of this executory contract, standing alone it imported no obligation of any sort. Keeping this distinction in mind, it is evident that the contract submitted by the complainant to the court of equity, and that upon which the defendant sued at law, were totally different affairs. Indeed, under the law of the case, their only point of similarity was that neither of them had any legal existence. The contract submitted to the chancellor was the one that would have resulted if the defendant had not made default. That upon which the defendant sued was the one that had resulted from that default. The former was sought to be validated as a contract in equity by the fact that the party who had been wronged had done equity, which very circumstance, mauger its purpose, was, by force of immemorial law, a waiver of all defenses strictly legal. For reasons presently to be stated, the court of equity might, with marked propriety, have held that the doctrine of *res judicata* would not suffer impairment by a decision that where a matter *in pais* had acquired a fixed import at law, but might have an opposite significance in equity, a judgment that accorded to such matter its strictly legal consequences would not control the effect to be given to it by a court of equity. If this be not so, the rule in question is a snare for honest suitors. Of this the present case is its own best illustration. The complainant, in order to merit equitable consideration, had to do equity under the terms of its legal obligation; but to recognize such obligation for any purpose was, in a court of law, to acknowledge its existence

for all purposes. Hence, to invoke equity, the complainant must at the same time renounce law. That was its dilemma. But if the very act by which it did equity be of itself a bar to equity, the affair is a travesty, and the way of the transgressor is made plain. This is obviously the effect of holding that the waiver of rights cognizable by the court of law was also a waiver of rights of which such court could take no cognizance.

"If the broad claim be made that the court of law had established that the policy of insurance was for all purposes the only contract between the parties, or that its judgment so conclusively embodied all the rights of the parties that none could be elsewhere established or otherwise enforced, the answer is that such a power did not reside in the court of law. If it were not that it would be dictum, there is a temptation to add that a court of law can never say that any writing so perfectly expresses the mind of the parties as to deprive a court of equity of its jurisdiction in those respects wherein its jurisdiction is exclusive. The order that has been brought here gives, as it seems to me, some such illicit weight to the legal judgment obtained by the defendant, and, by failing to note the distinction between the policy of insurance and the contract between the parties, has applied to the latter a judicial rule that at best could affect but the former. This fundamental error has resulted in an inequitable treatment of the complainant's case. It is now clear, beyond any doubt, that from the defendant's default there resulted to the complainant an election to avoid all liability under its policy by standing on its legal rights, or, upon the other hand, to recognize its liability to the extent that it had agreed to assume it, which was its equitable right. By its offer to pay the proportionate part of the defendant's loss, together with the unearned premium, and the cancellation of its policy, the complainant elected to take the equitable course, thereby abandoning all of its legal defenses. Its present grievance is that its election to do equity, and the fact that it has done equity, are the grounds upon which it is denied a hearing in equity. Obviously, this is the complainant's plight, which is the same now as when it filed its original bill. The equitable phase of its case has never been heard, and remains to be worked out upon the lines indi-

cated by the former opinion in this court, just as if the ineffectual episode of the legal trial had never been interposed. This is the equitable view of the complainant's position, and, to this end, the order appealed from must be reversed."

The above holding of the Court of Errors and Appeals of New Jersey, in the chancery case, merits more than a mere passive consideration upon the present hearing. No less than ten pages of the opinion of this court in the suit at law between these same parties (*Northern Assur. Co. v. Grandview Bldg. Assn.*, 183 U. S., 328–338), consists of quotations from the opinions of that court in actions at law, and expressly approved by Mr. Justice SHIRAS. In order to justify the court of law in refusing to apply the equitable estoppel against this identical plaintiff in error, Mr. Justice SHIRAS, among other expressions of that court embodied in his opinion, quoted from *Franklin F. Ins. Co. v. Martin*, 40 N. J. L., 568, the following: "If it (a policy of insurance) incorrectly or imperfectly expresses the actual agreement of the parties, it may be reformed in equity." (183 U. S., 331.) The opinion also quotes with approval from *Deweese v. Manhattan Ins. Co.*, 35 N. J. L., 366, the following: "It is possible, therefore, that in this case, in equity the present contract might be reformed, so as to contain a permission for the plaintiff to keep his stable in this building; but, I think, it has never been supposed that this end could be reached in this state, by proof before the jury in a trial at the circuit. . . . I am at a loss to see how, on the adoption of the principle claimed, we are to keep separate the functions of our legal and equitable tribunals." (183 U. S., 334.)

The doctrine of equity, announced by the New Jersey court in the case cited, follows logically, and is the necessary complement and corollary of, the rule held by the same

court in the cases at law, quoted and approved by this court in the opinion mentioned. Having approved the doctrine of its law cases, this court should consistently follow the equity rule which necessarily springs from it. Besides, the great reverence exhibited by the opinion of SHIRAS, Justice, for the New Jersey tribunal, gives assurance that an apt citation to the same court will be welcomed on the hearing of this case.

Jenkins v. Harrison, 66 Ala., 345–362, was a suit in equity to enforce a deed as a contract to convey. Suits at law had previously been instituted and prosecuted to adverse judgment by the plaintiff, for the purpose of recovering the legal title under the deeds. The court of Alabama, like that of Nebraska, based its decision on the opinion of this court in *Parker v. Judges*, and in stating and disposing of the plea of former adjudication, the chief justice said:

"There were numerous causes of demurrer assigned to the original bill by the appellants, which were overruled by the chancellor. We shall notice only such of them as have been insisted on in the argument of counsel in this court. The first is, that the bill proposed to re-open and re-try the matters which were tried and decided in the court of law. The suit at law, it is evident, was vigorously defended; the defense addressed mainly to the point, whether there was a delivery of the deed in the life of Jenkins, passing the legal estate to Harrison. The defense was successful; but the judgment at law, though it was resisted upon legal grounds, is far from precluding the appellee from resorting to a court of equity, for the enforcement of equitable rights, of which the court at law had no jurisdiction. *Greenlee v. Gaines*, 13 Ala., 198. The bill, so far from proposing to re-open and re-try the matters involved in the action at law—so far from drawing in question the correctness of the judgment obtained—when fairly analyzed, admits that the judgment was properly obtained, because the court of law could look only to the legal estate, and not to equities, which were

superior to it, and binding it and the heirs to whom it had descended. Failing to establish as a fact, the delivery of the deed, whereby he would have been clothed with the legal estate, Harrison claims independent equities, springing from the contract of purchase, —not as grounds for revising the judgment at law, but as causes for preventing the parties who obtained it from taking advantage of it. The bill presents questions which were not within the jurisdiction of the court of law, which were not presented, and which it would have been vain to have presented for the consideration of that court. Such bills are of frequent occurrence, and are uniformly maintained, if they disclose clear equities, rendering the enforcement of the judgment at law unjust and unconscionable. *Parker v. Judges*, 12 Wheat., 561."

Scully v. Lowenstein, 56 Miss., 652–4, like the present case, was a bill in equity to reform a written contract and to obtain a decree against the defendants on the contract as reformed. The defendants pleaded a judgment at law as *res adjudicata* of the matters involved in the bill. The principle involved is identical with that raised here upon the answer of the defendant. The court below had sustained the plea of *res adjudicata* and dismissed the bill. In reversing the case, Judge CHALMERS, expressing the opinion of the court, said:

"It is evident that the judgment at law can not be pleaded as *res adjudicata* against this bill. The action at law (upon the second count) was upon a special contract. It was defeated by the production of a written contract different from that averred. This suit in chancery is to reform the written contract, so as to make it speak the true intent of the parties. Manifestly, a court of law was incompetent to administer such relief, or even to consider the question of whether the written contract failed to speak the true intent; and if testimony was offered in that court with such a view it must have been excluded. The broadest statement of the principle of *res adjudicata* would extend it only to such questions as were litigated, or might have been litigated in the former suit; and inasmuch as the question of whether

there was a mistake in the written contract, by which it failed to express the true agreement of the parties, could not have been considered or adjudged in a court of law, the plea in this case was not good in so far as the bill sought to reform the contract, and to base the claim for relief upon a breach of it as reformed. *Mosby v. Wall.*, 23 Miss., 81."

Mosby v. Wall., 23 Miss., 81–83, cited by the court in Scully v. Lowenstein, was also a suit for reformation, brought after the failure of the suit at law to enforce the contract. In holding that the judgment in the suit at law did not conclude the parties, it was said in the opinion by Mr. Justice CALYTON:

"The record in that case, which by agreement is made part of the record in this, and the decision in the case, show that the first suit was not competent to the investigation of the merits. Only judgments of that kind, in which the merits might have been tried, are conclusive. *Agnew v. M'Elroy*, 10 S. & M., 555."

Hawley v. Simons, 102 Ill., 115–120, was a suit in equity to reform a deed. The suit was instituted after an action at law (ejectment) had failed. The judgment in the ejectment suit was pleaded in bar. The court, disposing of the plea of former adjudication, said (pp. 118–119):

"The plaintiff in error, supposing he had a title at law to the land in question, went into a court of law for the purpose of enforcing it, but upon the trial he discovered he had no such title, and the court so decided, and the decision upon that question is final and conclusive on him and all persons claiming under him. Plaintiff in error is not endeavoring in the present suit to enforce the title which was defeated at law. On the contrary, he admits that at that time he had no title which could be enforced in a court of law, and he is perfectly content with the decision in that case, and does not at all seek to question its conclusiveness in this case. He now says that he has an equitable title to the land, which he desires to make available by clothing himself with the legal title, which in equity should be con-

ferred upon him, and he is told by counsel learned in the law that this equitable title is barred by the adjudication in the legal forum. How was it barred? It was not even before that court for its consideration, and that court, even if it had been, had no power or jurisdiction to pass upon it. That court, as we have already seen, simply determined that plaintiff in error did not have the legal title, which he was attempting to enforce. The trial at law did not affect the defendant's title, or even determine he had any title at all—it simply determined the plaintiff had none, and the plaintiff is now trying to obtain one, which he insists in equity and good conscience he should have."

Schrepfer v. Rockford Ins. Co., 77 Minn., 291–296, was a suit at law for the recovery of a loss on a fire insurance policy. A policy stipulation provided for a reference, in case of dispute as to the amount of the loss, to three disinterested men. The defendant demanded a submission to referees, in conformity to the policy. The assured refused to enter into reference, and brought an action at law on the policy. In this suit, the company recovered judgment dismissing the action on the ground that the reference provided for in the policy was a condition precedent to the right to sue on the policy. After having prosecuted the first suit to an adverse judgment, the assured offered to enter into an arbitration, but the company then refused to do so, on the ground that the assured's refusal to arbitrate when the company demanded an arbitration, and her bringing an action and prosecuting it to an adverse judgment, concluded and barred the assured. The assured thereupon instituted a second action at law upon the same policy. In upholding the right of the assured to maintain the second suit upon the policy, the supreme court of Minnesota, by MITCHELL, J., said:

"Upon the main question in the case, going to the merits, counsel for the defendant contends that, under the doctrine

of election between inconsistent remedies, the plaintiff, having elected to stand on her right to recover without any appraisal, is bound by her election, and is now estopped to assert her right to recover on the ground that the defendant has waived an appraisal. The doctrine of election between inconsistent rights or remedies has no application. The plaintiff never had any election of rights or remedies. She had but one right or remedy. Her action was a mere futile attempt to assert a right which she never possessed, and in which she was defeated. This did not estop her from subsequently asserting the right and remedy which she, in fact, possessed. *In re Van Norman*, 41 Minn., 494, 43 N. W., 334."

Conyers v. Mericles, 75 Ind., 443, was a suit in equity to reform a mortgage so as to correctly describe the land intended by the parties to be conveyed. Prior to the institution of this suit, the plaintiff had prosecuted a suit upon the mortgage, in the form in which it was written, to a decree and a sale of the property. The former judgment was pleaded as a defense to the action to reform. In the opinion the court said:

"The appellant does not seek to recover the property, nor to correct the mistake in such foreclosure proceedings, but, ignoring such proceedings, he seeks to reform and foreclose his mortgage. This he may do, unless its previous foreclosure prevents him. Such foreclosure was by the erroneous description—was, in fact, upon a different parcel of land, one that was not, in fact, mortgaged nor intended to be mortgaged, and was, therefore, a mere nullity. The mortgage, as reformed, is a different instrument, embraces a different parcel of land, and one against which no foreclosure has been had. The judgment of foreclosure upon the land described did not adjudge that the land in dispute was not mortgaged by such instrument, and omitted therefrom by mistake, and, therefore, 'the question on description' is not *res adjudicata*, nor does such judgment form any obstacle to the reformation and foreclosure of the mortgage. This view is not unsupported by authority."

In *Kramer v. Moore*, 36 O. S., 347, the case is correctly stated in the syllabus as follows:

"In an action on a promissory note, the maker is not estopped from setting up want of consideration or fraud by a judgment dismissing his petition on the merits in an action brought to enjoin the negotiation of the note and to obtain its surrender and cancellation, although the matter set up as defense was relied on as the ground of relief in the petition."

In the opinion it was said (p. 350):

"In speaking of the effect of such a decree, in *Neafie v. Neafie*, 7 Johns. Ch. 5, Chancellor Kent says: 'A decree *dismissing a bill* upon the merits, does not establish any new right to be carried into effect; it only discloses that the plaintiff has failed to establish the equity which he had set up.' And in *Beere v. Fleming*, 13 Ir. C. L. R., 506, it is laid down, 'that the dismissal of a bill seeking equitable relief in respect to an instrument on which a party can sue at law, is no bar to an action at law upon the same instrument, although the decree does not state the dismissal to have been without prejudice.' See also *Lessee of Wright v. Dcklyne*, 1 Pet. C. Ct., 192."

Hill v. Combs, 92 Mo. App., 243, was an action at law against the guarantors of a promissory note. There had been a prior suit prosecuted to adverse judgment by the plaintiff against the same defendants, in which they were sued at law as makers of the same note. The trial court held the former judgment to be a bar. In reversing the judgment of the trial court, after pointing out that the liability of the guarantors was a separate and distinct liability apart from that of a maker, the court said (pp. 256–257):

"It has been held that when a party imagines he has two or more remedies, or who misconstrues his rights, he is not to be deprived of all remedy because he tries the wrong one.

State ex rel. v. Convent, 116 Mo. loc. cit., 575; *Bunch v. Grave*, 12 N. E., 517. And so it has been ruled 'that the mere fact that a party mistakes his remedy, believing he has two or more remedies when he has not, and pursues the wrong one, will not of itself prevent him from subsequently obtaining redress by the proper remedy.' Elliott's Gen'l Prac., sec. 276.

"In *Snow v. Alley*, 156 Mass., 193, it is said election of remedies exists when a party has two alternative and inconsistent rights and it is determined by a manifestation of choice. *Metcalf v. Williams*, 144 Mass., 452. But the fact that a party wrongly supposed that he has two such rights and attempts to choose one to which he is not entitled, is not enough to prevent his exercising the other if he is entitled to that. There would be no sense or principle in such a rule. *Johnson v. Railroad*, 126 Mo. loc. cit., 352.

"The plaintiff erroneously supposed that he had a right to sue defendants on said note as joint makers with others. The court held that the defendants were guarantors and not makers, and therefore the plaintiff could not recover against them in that action. The action against the defendants was not on their contract as guarantors. The plaintiff did not in that action seek to enforce any liability of that kind. By that action he attempted to recover only on the ground that they were makers. The cause of action alleged against them as makers was not sustained. The other cause of action on their contract of guaranty was not touched or litigated in that action. How then can the judgment in that case bar the action in this case which is on the contract of guaranty?

"Unless the cause of action be the same in two different suits, the judgment in the first will not bar an investigation of the merits in the second. Such judgment concluded the rights of the parties in respect to the cause of action stated in the pleadings on which it was rendered. *Railroad v. Traube*, 59 Mo., 355. None of the cases cited by the defendants decide anything contrary to this."

In this presentation of the adjudged cases which narrow the application of general principles to facts analogous to

the facts of the present suit, we do not pretend to have been exhaustive. The cases referred to, however, present a great variety of situations for the application of the principle, in which the first suit seems to have taken the *form* of an action upon the contract *as written*.

In the Illinois case (*Hawley v. Simons*, 102 Ill., 115), the first suit was to establish a title to land under an executed deed. After the court of law had found the deed, *as executed*, conveyed no title, the equity court proceeded to reform the same instrument so as to create a title. It requires no great discrimination to see that the principle of that case is identical with that which plaintiff invokes in the present suit. A suit in ejectment where the sole claim to title is under a deed, is, in effect, an action to enforce the instrument as written.

One of the Mississippi cases (*Scully v. Lowenstein*, 56 Miss., 652), presented a situation almost identical with that exhibited in the present suit. The independent equity, not embraced within the letter of the contract, was not affected or concluded by the prior suit at law, because that issue "could not have been considered or adjudged in a court of law."

In the Minnesota case (*Schreffer v. Rockford Ins. Co.*, 77 Minn., 291), the second suit was admissible, because plaintiff had at first mistaken her remedy.

The Alabama case (*Jenkins v. Harrison*, 66 Ala., 345), decreed a conveyance in a suit in equity, after the same plaintiff had prosecuted to adverse judgment an ejectment suit based on the same instrument, as his sole evidence of title. The prosecution of the suit in equity was approved, where the bill presented "questions which were not within the juris-

diction of the court of law." "Such bills," said the court, "are of frequent occurrence, and are uniformly maintained, if they disclose clear equities, rendering the enforcement of the judgment at law unjust and unconscionable."

Chief Justice MARSHALL, in the mandamus case brought to test the power of an equity court to entertain a bill involving the subject matter of a prior suit at law (*Parker v. Judges*, 12 Wheat., 561), held that where the bill "proposes to try a question entirely new, which has not been and could not be litigated at law, it may be brought before the commencement of a suit at law, pending such suit, or after its decision by the highest law tribunal."

In the Indiana case (*Conyers v. Mericles*, 75 Ind., 443), reformation was decreed, notwithstanding the prosecution of a prior action to judgment upon "the instrument as written."

In the Ohio case (*Kramer v. Moore*, 36 O. S., 347), the prior suit was in equity. There the court of law, following the reasoning of the equity courts where the situation was reversed, held the equity suit was not a bar, because defendant's right being available as a defense at law, the equity court must have dismissed the bill because the legal remedy was adequate.

The New Jersey case (*Ins. Co. v. Rubber Co.*, 51 Atl., 451), reaches all the questions of estoppel by election and former adjudication, that are raised in the present case, and holds flatly to the contention of plaintiff. The reasoning of the court is profound. "A court of law," says the judge delivering the opinion, "can never say that any writing so perfectly expresses the minds of the parties, as to deprive a court of equity of its jurisdiction in those respects wherein its jurisdiction is exclusive." Again, it is said, "The equitable phase of its case has never been heard, and remains to be worked

out, . . . just as if the *ineffectual episode of a legal trial* had never been interposed."

Justice BREWER, in sustaining a bill to bring a trustee to an accounting, after the unsuccessful prosecution of a suit at law in respect to the same subject matter (*McComb v. Frink*, 149 U. S., 629), said: "It would seem strange to hold that such judgment is a bar to a suit in equity for a breach of the trust."

The pleas of estoppel by election, and by former adjudication, as presented in this suit, are not supported by sense, nor reason nor well considered precedent. The situation in which its application would put plaintiff is like that of a private soldier recently shown in a newspaper cartoon. The first picture shows the private slapped by a subaltern; he reports the indignity to the captain, exhibiting the disfigurement caused by the blow, and gets three days in the guard house for disorderly appearance. The second picture shows the private kicked by the subaltern. Correcting the first error in his appearance, he reports this indignity to the colonel in full dress, and gets five days for not keeping silence. The third and last picture shows the private punched in the back by the subaltern. This time he avoids both of his former errors, and does nothing but rub his wound, and for thus failing, through fear, to report, he gets seven days in the guard house. Before the court can consistently hold an estoppel against plaintiff in this suit by reason of its former misadventure, it must first adopt a system of administering justice similar to that shown by the cartoon.

The rules held, in the cases heretofore reviewed, are in accord with the elementary doctrines governing the law of *res adjudicata* and election of remedies. The cases, cited below, show that the general current of judicial opinion, in the

courts of the country, sustains the holding of the state court in the case under review.

In re Van Norman, 41 Minn., 496, it was said in the opinion:

"The rule is as undoubted as it is familiar that where a party has inconsistent rights or remedies he may claim or resort to one or the other at his election, and that when once made, his election is irrevocable. But we think it is equally true that a mere attempt to pursue a remedy or claim a right to which a party is not entitled and without obtaining any legal satisfaction therefrom, will not deprive him of the benefit of that to which he originally had a right to resort to or claim."

In *Bunch v. Grave*, 111 Ind., 351, 357, it is said in the opinion:

"She is not in the situation of a party who, having two inconsistent remedies, resorts to one and is thereby concluded by her election. She had but one effectual legal or equitable remedy, and that was to have had adjudged that the decrees held by Grave were satisfied. A party who imagines he has two or more remedies or who misconceives his rights is not to be deprived of all remedy because he first tries a wrong one. Kelsey v. Murphy, 26 Pa. St., 78 (83); Morris v. Rexford, 18 N. Y., 552; Lee v. Templeton, 73 Ind., 315. When Mrs. Bunch instituted her proceeding in the first instance, the appellee was wrongfully asserting his purpose to enforce the decrees which were extinguished, to her prejudice. Her proceeding was a misadventure. It proved unavailing because of the delay successfully interposed by her adversary. It has not, however, deprived her of the relief to which, upon the facts, she is equitably entitled. That proceeding has affected no right of the appellee. He could have ended the litigation long ago by giving over his purpose to perpetuate a wrong upon the appellant. The justice to which she was entitled from the beginning and which has been too long delayed ought not to be wholly denied because she mistook her remedy in the first instance."

In *Fifield v. Edwards*, 39 Mich., 266, Judge COOLEY, in delivering the opinion of the court, after stating the general rule as to the conclusiveness of estoppels by judgment, said:

"But there can be no bar if the demand to which, by their evidence, the parties directed the attention of the court, and which the court rejected, was not within the issue, and consequently could not have been allowed. The estoppel does not depend upon technicalities, but rests in broad principles of justice, and it can apply only when the party has had his day in court, and an opportunity to establish his claim. The fact that a suit has been instituted, and evidence produced is of no importance whatever, if, in fact, the evidence was directed to matters which were foreign to the issue. If, for example, the plaintiff in an action of assumpsit, were to attempt to litigate a matter of trespass to lands, it would be immaterial how far he should go into the evidence, or at what stage of the proceedings the rule should be made rejecting his claim; the bar can not attach, because, in law, whatever may have been the testimony, there could have been no recovery. Nothing would seem to be plainer than that no man could be barred by a judgment against him, who was not by the issue placed in such a position that establishing his demand would entitle him to a judgment in his favor."

In *Marsh v. Masterton*, 101 N. Y., 407, in an opinion holding a former judgment in a suit between the same parties to be a bar only when the point or question in issue is the same in both suits, it was said in the opinion of the court:

"The estoppel of the adjudication made on grounds purely technical, and where the merits could not come in question, is limited to the point actually decided, and will not preclude a subsequent action brought in a way to avoid the objection which proved fatal in the first. When a suit fails in consequence of the want of jurisdiction, or because the plaintiff misconceived the remedy or did not bring the proper parties before the court, and not from any inherent defect, the substance of the cause is left at large and may be made the subject of another action."

In *Stowell v. Chamberlain*, 60 N. Y., 272, it is held that in order to make a former action a bar, circumstances must be such that the plaintiff might have recovered in the first action for the same cause of action alleged in the second. It is not enough that the transactions involved in and giving rise to the two actions are the same.

Snow v. Alley, 156 Mass., 193, was a suit to recover on a contract for the purchase of bonds. A previous suit had been prosecuted to an adverse judgment by the same plaintiff for trover in which the plaintiff had sought to recover also the value of the bonds. The prior judgment was pleaded in bar. In the opinion it was said (pp. 194–195):

"If, then, the former proceeding establishes anything, it establishes that the plaintiff is entitled to insist upon his contract, since, although he began his suit intending to repudiate it, if he could make out a case for doing so, he took his judgment on the footing that it was in force. But apart from this answer, the defendant's argument rests on the misapprehension of the nature of election. Election exists when a party has two alternative and inconsistent rights, and it is determined by a manifestation of choice. *Metcalf v. Williams*, 144 Mass., 452–454. But the fact that a party wrongly supposes that he has two such rights, and attempts to choose the one to which he is not entitled, is not enough to prevent his exercising the other, if he is entitled to that. There would be no sense or principle in such a ruling."

In *Kelsey v. Murphy*, 26 Pa. St., 78, the court in the opinion said:

"It is of no moment that both proceedings resulted from the same transactions, and that much of the evidence was applicable to both, for a party imagining that he has several remedies, is not to be deprived of the right to one because he first tried a wrong one."

Morris v. Rexford, 18 N. Y., 557, holds, under the peculiar facts of that case, that the election by bringing a first suit is binding upon plaintiff only in the event that his first action is successful. In the opinion it is said:

"The acts of the plaintiff in demanding the goods and retaking them by writs of replevin were not a circumstance immediately bearing upon the general question of sale and delivery about which there was no doubt, but they were an election of one remedy to the entire exclusion of the other. If it shall appear on another trial that no such right of election existed, then the replevin suits will have no effect at all upon the present controversy, and the plaintiff will be entitled to recover, provided the jury shall again find that the defendant was the purchaser. If, on the other hand, it shall appear that the plaintiff did not lose his right to retake the property on the failure of the purchaser to pay the price, the choice of remedy which he adopted will be a bar to the present action."

In *McLaughlin v. Austin*, 104 Mich., 489, the suit was for the price of plumbing done in a house. Before suing the owner of the house, the plumber had filed his lien in which he made oath that the plumbing was done in pursuance of a contract with the contractor. It was held that the filing of the lien was not such an election as precluded him from maintaining his suit against the owner. In the opinion, after stating the general rule of election of remedies, the court (p. 491) says:

"This rule is not inconsistent with the practice of bringing a second and different action where it appears that the plaintiff never had a right of action as first brought, and therefore could not have elected. There is a difference between an election of remedies and a mistake of remedies, and the law has not gone so far as to deprive parties of meritorious claims merely because of attempts to collect them by inappropriate actions upon which recovery could not be had."

In *Gould v. Blodgett*, 61 N. H., 115, the holding of the court is correctly stated in the syllabus as follows:

"If an agent for the sale of a chattel deliver it to his creditor in payment of his own pre-existing debt, the owner may maintain trover against the creditor without a previous demand. The unauthorized delivery of the property by the agent to his creditor in payment of his own debt is not a sale; and the bringing an action of assumpsit against the creditor for the value of the property by the owner is not a ratification of the unauthorized delivery nor a conclusive election of remedies.

"Bringing an action of assumpsit in such a case is a misconception of the remedy, and not an election of remedies such as will bar a subsequent action."

Further illustrations of the application of the doctrine here contended for are *Smith v. Bricker*, 86 Ia., 285; *Madden v. Louisville, etc., R. Co.*, 66 Miss., 255; *The Standard Oil Co. v. Hawkins*, 46 U. S. App., 115; *White v. Whiting*, 8 Daly (N. Y.), 23; *Bowdish v. Page*, 81 Hun (N. Y.), 170; *Kittredge v. Holt*, 58 N. H., 191.

We have reviewed the authorities sufficiently to exhibit a multitude of precedents, upholding and enforcing the rights of suitors to maintain a second suit, in situations analogous and identical with that of defendant in error. If they are followed, defendant in error must be adjudged to have rightly maintained the second suit, since in the first it mistook its remedy. In its first suit, as in this one, defendant in error alleged, in effect, that it had contracted for concurrent insurance. Indeed, right to relief, in the present case, depended largely upon the existence of the facts asserted in the first suit, which the jury found in the assured's favor. The petition presented by defendant in error, in the suit at law, and the bill in equity in the present suit, however crit-

ically examined, will develop no inconsistency. The same result which followed the reformation of the contract was claimed in the suit at law under the doctrine of equitable estoppel, which was then thought to preclude the assured from taking advantage of the omission to endorse consent to concurrent insurance. There, the relief ultimately sought was, in effect, a *negative* enforcement of the equitable right *affirmatively* claimed in this suit in equity. In supposing that the law court could give equitable relief, by applying the rule of estoppel, assured was mistaken. It mistook its remedy, so that its first suit was a misadventure. It finally turned out that the court of law could give no relief, even upon the facts alleged and established by the finding of the jury, until the assured had first corrected its policy by decree in chancery. In such a case, the second suit is allowable; and to deny it would deny the assured all remedy. The law has not gone so far as to deprive parties of meritorious claims, merely because of attempts to collect them by inappropriate actions, upon which recovery could not be had.

A fundamental principle, deducible from the authorities, is that to create an election, such as to preclude a suit upon a different cause of action, it must appear that there were, in fact, two remedies available. This essential element of an election is wholly absent from the present case. On the face of the record, there were not two co-existing remedies available to the assured. It had no choice of remedies. On the contrary, the insurance company successfully maintained, in the prior proceedings, that the assured had only one remedy available, upon the facts actually pleaded *and found in its favor by the verdict of the jury*, namely, an action for reformation, by which consent to other insurance might be written in the contract in conformity to the agreement actually made. The prior judgment established that

the assured had only one remedy, and that the court of law could not take cognizance of its equitable claim, based upon facts pleaded and found to be true, but which were extrinsic of the written instrument.

The assured, on these facts, can not be held to have estopped itself from invoking its sole equitable remedy, without a sacrifice of elementary principles. Reduced to its last analysis, the plea of election, as sought to be here applied, would work out as follows: Assured had good grounds for redress in equity, but none at law. Counsel made the mistake of suing at law, stating in the petition the fact of other insurance, which precluded relief in that forum. The suit failed because that court had no power to enforce the equitable right which assured asserted. It was solemnly adjudged that assured's rights could only be enforced in equity. Assured is now in the equity court, where the court of law sent it; and it is now urged that it can have no relief because, by misadventure, it first invoked the powers of the common law court, and was there turned away because its powers did not embrace the relief to which plaintiff was entitled. Under such a rule, the offices of the courts would be to turn suitors out because they came in the wrong way, and afterward to deny relief, when suitors came in the right way, because of their first misadventure. "There would be no reason or sense in such a rule." It would convert courts of justice into Circumlocution Offices, so graphically exhibited by Dickens in "Little Dorrit," and the presiding justices into Barnacles, whose chief care would be to teach suitors invoking their powers "how not to do it," instead of discovering and applying remedies for redress of wrongs, in which courts of equity delight.

In the foregoing discussion, we have endeavored to search out the fundamental doctrines of election and *res adjudicata*

and to apply them to the facts of the present case. On principle and precedent, the right of assured to maintain the suit is clear. We have not felt called upon to present the testimony, which amply sustains the finding of the trial judge, that the parties contracted for right to have the concurrent insurance. We understand that, by the settled practice, this court refuses to examine or determine the sufficiency of the evidence, and that its powers of review do not, in this case, reach that issue. The federal question is: conceding the facts to be as alleged and found, does the judgment in the suit at law preclude the state court from reforming the policy?

It is conceded there are some isolated and ill considered decisions containing statements to the effect that where the first action takes the form of a suit upon the contract as written, a suit in equity for a rescission or reformation or other kindred relief will not lie. These cases are not, however, grounded upon principle, but are clearly a perversion of the rule held by Chancellor Kent in *Sanger v. Wood*, 3 Johns., Ch. 417–421. In so far as these cases ignore the requirement that the two causes of action must be inconsistent before the prior judgment can bar the subsequent suit, they are a manifest departure from fundamental principle and are at war with the firmly established doctrine of this court. One of the cases on which defendant relies is *Thomas v. Insurance Company*, 108 Ill. App., 278, but recently decided in the appellate court for the City of Chicago. The ruling does not have the weight which is accorded to a court of last resort, and besides there was another independent ground for sustaining a demurrer. Among the cases cited as authority are *Sanger v. Wood*, above referred to, and *Washburn v. Great Western Insurance Company*, 114 Mass., 175. Turning to the Massachusetts case we find that the sole authority cited for the ruling there adopted is *Sanger v. Wood*, 3 Johns., Ch.

421. We find in that case no holding that in any wise conflicts with the contention of plaintiff here. Chancellor Kent distinctly held against the right to maintain the second suit in that action, because of the utter inconsistency of the two actions, which he distinctly pointed out, the first suit having *affirmed* the written contract and having been tried when the plaintiffs had knowledge of the facts which in the second suit they set up to *avoid* the same contract. In the opinion of Chancellor KENT (*Sanger v. Wood*, 3 Johns., Ch. 421), it is said:

"The suit at law, and the action here, are inconsistent with each other, since the one *affirms*, and the other seeks to *disaffirm*, the contract in question. It is probable the amount of the judgment may have been already collected, and the plaintiffs could not, for a moment, be permitted to keep the moneys recovered under that contract, if they should succeed in their bill to have it annulled. In a case *where the remedies sought are so absolutely repugnant to each other*, the plaintiffs ought to have made their election at once, after they came to the knowledge of the facts. If they meant to have disannulled the contract of *April*, 1816, then it was vexatious, as well as useless, to have gone on to a trial, and judgment and execution. They had no right to try the experiment how much they could recover at law under the contract, (for the bill admits the suit at law was brought upon that agreement,) before they elected to waive it, and then, retaining their verdict and entering judgment at law apply to this court to set the contract aside. This proceeding would be giving the plaintiffs a double advantage, and is unreasonable and inadmissible."

It will be seen from the above quotation that the Chancellor founded his decision upon fundamental doctrines. He recognized the qualification established by this court that the two remedies must be *co-existing* but not concurrent, and that they must be so utterly *inconsistent* that the choice of one necessarily operated to renounce the other. That de-

cision is the adoption and application of the principle for which assured contends in the present suit.

The assured brings its case clearly within the doctrine announced by Chancellor KENT. Here the ultimate end of both suits is to recover upon the contract, and even the first suit did not predicate the sole right of recovery upon the precise terms of the written instrument. An essential element of assured's original case was its plea of *equitable estoppel*, by which it sought to avoid the operation of one condition of the written contract. The extrinsic facts, not embodied in the contract, presented an issue, however, not cognizable by the common law court. Assured here is invoking a new remedy to accomplish the very end aimed at by the first suit, and the record shows that resort to this forum is necessary because it had no remedy at law.

Assured's case differentiates from all the cases cited against it in one vital particular. The facts in issue by the pleadings in the former suit are distinctly and flatly found by the jury in plaintiff's favor. In its case there was no general verdict and no general finding against it. Judge Munger refused to permit the jury to make a general finding, and upon all the issuable facts on which it was supposed a favorable finding would warrant a judgment, the findings are in plaintiff's favor. Upon this record the judgment of the federal court has precisely the same effect as if entered on demurrer to the petition, assigning the want of jurisdiction of the court of law over the subject matter of the proceeding. Notwithstanding the favorable findings returned by the jury, the ultimate ruling embodied in the journal entry in that case is that the court of law had no power to grant relief under the plea of equitable estoppel, which exhibited grounds for relief that were cognizable only by a court of equity.

There is absolutely no precedent in the adjudged cases for a holding that the plaintiff is estopped by the specific findings in his favor made in a prior suit prosecuted in a court that was powerless to grant relief.

The plea that assured is deprived, by pursuing another remedy of the right to prosecute the present bill, involves an issue separate and distinct from the constitutional requirement that credit shall be given to judicial proceedings, and is one over which the state supreme court has final authority.

The argument presented by the brief of plaintiff in error seems to rest wholly upon the proposition that by first suing at law, the assured elected to stand upon the policy as written (brief p. 51, etc.). As we read the brief, it seems to abandon the issue, pleaded in its answer to the bill, that plaintiff's right to sue in equity for reformation was within the issue in the former case, and comprehended within the precise and exact terms of the former record and judgment.

To present the point stated in the headnote, we here repeat the definition of *election* given by the CHIEF JUSTICE in *Peters v. Bain*, 133 U. S., 670–696:

"The doctrine of election rests upon the principle that he who seeks equity must do it, and means, as the term is ordinarily used, that where two inconsistent or alternative rights or claims are presented to the choice of a party by a person who manifests the clear intention that he should not enjoy both, then he must accept or reject one or the other; and so, in other words, that one can not take a benefit under an instrument and then repudiate it."

If the matter, sought to be concluded by the doctrine of election, were comprehended within the precise terms of the judgment record, discriminations as to the meaning of the term election would be wholly unnecessary. The rule of

res adjudicata would then apply; and the party, seeking by a subsequent proceeding to re-litigate the same right, would be precluded by the precise terms of the former judgment.

The effect of the former proceedings as an election become proper subjects of consideration, only in those cases where the subsequent suit presents a new and different cause of action. And then the rule of election to be applied rests, not upon the former judgment, but upon the *conduct* of the suitor, in previously pursuing a course that is utterly inconsistent and incompatible with granting him relief, in the second suit, upon a new and different cause of action. If, in the first suit, he took the benefit of a contract, he can not, in the subsequent suit, obtain relief by repudiating and showing the invalidity of the same contract, of which he has previously had the benefit. In this behalf, we again note that the finality and conclusiveness of an election does not depend upon a former judgment having been rendered, nor upon any judicial proceedings. The former proceedings are admissible, only as evidence that the suitor has previously pursued an inconsistent course, evincing a purpose to renounce the right set up in the second suit. Such election can, however, be shown by evidence other than the institution or prosecution of a former suit to judgment (1 Bishop on Contracts, sec. 808).

The defense of *res adjudicata* is established by the record of the former judicial proceedings, showing the cause of action pending to have been within the issues in a former suit, and the right sought in the second suit to be enforced to have been comprehended in the precise terms of the former judgment or decree. Upon this defense, the constitutional requirement that credit be given to judicial proceedings, would be violated if the former judgment, being proved,

were not given due faith and credit. The defense of election, on the contrary, is made out where the constitutional question can not arise, in cases where the right sought in the second suit is not comprehended within the record of the prior judgment. It involves one of the general rules of jurisprudence, separate and distinct from the constitutional requirement that due faith be given to prior judgments, and is applied to those cases in which the right sought to be enforced by a second suit was not comprehended in or concluded by the former judgment. The plea of *res adjudicata* raises the question of whether due faith was given to the prior judgment in conformity to Article 4, Sec. 1 of the Constitution. The plea of election is intended to protect a defendant against unconscionable and inconsistent prosecutions upon extrinsic grounds, arising outside of the former judicial record. One defense comes within the protection of the constitutional provision in question; the other is, obviously and manifestly, without the constitutional provision. The appellate functions of this court, in this case, are limited to the right to enforce observance, by the supreme court of the state of Nebraska, of the constitutional rule requiring full faith and credit to be given to judicial proceedings. Upon a question involving a right asserted under the Constitution of the United States, the supreme court of Nebraska is an intermediate tribunal only, but upon all other questions its authority is final.

We have endeavored to show that the decision of the state court, so far as it involves the doctrine of election, is right, and that it is based upon correct principles and in harmony with the rules of this court. While we have felt no disposition to evade the main issue upon the doctrine of election, and have defended the judgment of the state court upon this question with pleasure, we, nevertheless, regard it our duty

to challenge the court's attention to what we conceive to be the proper limitations of its authority. Upon the defense of *res adjudicata*, interposed by the insurance company, which involves the inquiry of whether the present cause of action is comprehended within the former judgment, the authority of this court is undoubted and unchallenged. This issue seems now to be abandoned by the plaintiff in error; and while upon the contest over the doctrine of election we are pleased to defend the state court, we question the propriety and power of this court to determine upon the issue of election, upon the ground that this defense is predicated upon the *conduct* of the suitor, and not upon the former judgment.

The fundamental doctrines applicable to the assured's case, as announced in the cases cited, furnish ample justification for the judgment assailed by this proceeding. Tested by correct rules, the record does not exhibit any refusal of due faith and credit to the judgment at law pleaded as a former adjudication. The judgment of the state court should, therefore, be affirmed.

IV.

In expressing a dissent from the rule announced by this court in the former suit between the same parties, the state court, professedly and consciously, went beyond the issues presented by the record before it, and its expression in that behalf is mere obiter dictum.

The conclusiveness of the judicial proceedings, pleaded as a former adjudication, is not affected by considerations of whether they are correct, or obviously erroneous.

By assignment 7 (printed record, pp. 146–147) plaintiff in error charges that the Nebraska court, by its opinion and judgment, held "the alleged oral understanding or agreement

between defendant in error and the agent of the plaintiff in error, to the effect that the insurance company would permit concurrent insurance, contrary to the expressed terms of the written contract in controversy, was in full force and effect between the parties hereto at and before the fire described in the evidence; whereas the United States court had previously held and adjudged, in the manner aforesaid, that, as against the express terms of the policy, no such understanding or agreement existed."

The brief of plaintiff in error (p. 75) urges upon this court a suggestion that the state court refused to be bound by the former judgment, rendered pursuant to the mandate of this court in the action at law, because of its dissent from the views expressed by this court in its opinion. That such suggestion is entirely without foundation, is perfectly clear upon the face of the record; but, as we understand, it is the purpose of the counsel to invite resentment at the dissent expressed by Judge Ames in the opinion of the state court, such as may possibly influence the decision here. We are sufficiently reverent and trustful as not to entertain a suggestion that this court will surrender any of its greatness by yielding to such motives, in order to reach a decision in the present case upon considerations not embraced in the record before it. At the same time, we concede that this court should be jealous of its prerogatives, and insistent on a proper observance of its own judgments and mandates. For that reason, we supplement the argument heretofore presented, by showing, upon the record, it is not true that the state supreme court refused credit to the former judgment of this court upon the ground asserted, nor upon any other ground.

We have heretofore shown that defendant in error did not contest the validity of the former judgment. Its right

to recover in the equity suit, in the forum where it was heard, was, in one aspect of its case, distinctly based upon the previous judgment at law. The maintenance of its action required that the former judgment, in the suit at law, be treated precisely as though it had been rendered in a law court of the state, and that, as such, it be given full faith and credit. The rendition of the judgment, now under review, implies, necessarily, that the former adjudication was given the faith and credit required by the constitution, the acts of Congress, and the decisions of this court. Upon no other theory could the defendant in error have had any standing in the equity court of the state. This is so, because of the rule obtaining, generally, in Nebraska that, upon the facts pleaded, the assured would have a remedy at law. (*Home Fire Ins. Co. v. Wood*, 50 Neb., 386). In Nebraska, as well as by the unbroken line of decisions of this court, the test of a suitor's right to maintain an equity suit is whether, on the facts shown, he has a remedy at law. This rule is distinctly asserted by Judge Ames in the opinion delivered by the state court in the case at bar (printed record, p. 131), wherein he says: "Because it is so, a suit in equity, to obtain a vain and unnecessary reformation of the contract, would not lie." So, in arriving at the conclusion sustaining the decree of the trial court, it was necessary to import the previous judgment into and make it a part of the jurisprudence of the state, for the purposes of the present suit, and to give, not only the judgment, but the rule of law upon which it was based, full faith and credit, and treat it, for the purposes of the pending suit, as importing unimpeachable verity. Observance of the constitutional requirement, that the previous judgment should be given full faith and credit, was essential to the maintenance of the suit; because, otherwise, plaintiff could have recovered in a suit at law, and the bill in equity would not lie.

Giving credit to the former judgment, while a constitutional requirement, did not imply that the state supreme court assent to the correctness of the rule held in the previous case, as an abstract proposition. So, quite naturally, by reason of the conflict of opinion on the question, the judge delivering the opinion in this case, after thus acknowledging the court to be bound by the rule in the case before it, wandered away from the issues raised on the record, and expressed his personal dissent from the doctrine upon which the previous judgment was founded, and, at the same time, directed attention to the circumstance that the ruling here was by a divided court. We confess our inability to see how the dignity and commanding superiority of this court can be injured by indulging the judge of the state court in the privilege of thus exploiting his personal views, upon an abstract rule of law, not involved in the case. The point at issue is, whether, upon the face of the record, due credit was given to the former judgment. It appearing that credit was so given, the discussion should end.

It must be conceded that the conclusiveness of the prior judgment, upon the immediate parties to the record, can not be affected by the circumstance that the CHIEF JUSTICE and Justices HARLAN and PECKHAM dissented, nor by considerations as to whether the conclusion reached was correct, or openly and obviously erroneous. The judgment, actually entered, forecloses all of these questions, so that thereafter, as between the parties, the question of the intrinsic merit of the decision is wholly academic. A statement of an elementary principle, so well known, does not need to be fortified by citation of authority. The point involved, in the assignment of error under consideration, therefore, does not arise upon this record. To entitle the point to considera-

tion here, it is essential that it be shown to be one of the matters in judgment.

In *Carroll v. Lessee of Carroll*, 16 How., 286–287, Mr. Justice CURTIS, delivering the unanimous opinion of this court, said:

"If the construction put by the court of a state upon one of its statutes was not a matter in judgment, if it might have been decided either way, without affecting any right brought into the question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs. And therefore, this court, and other courts organized under the common law, has never held itself bound by any part of an opinion in any case which was not needful to the ascertainment of the right or title in question between the parties."

Tested by the rule above quoted, the present record involves no assumption of power by the state court to review or revise the holding of this court in the former suit. The question of whether Judge Ames concurred in the views formerly expressed by this court was a matter of absolute indifference. If we were to cut out of his opinion the paragraph introduced by a reference to the circumstance that this court was divided, which is the one containing his dissenting views, and substitute a paragraph commending the majority opinion as a profound embodiment of all wisdom upon the question, and recommending the adoption of its views by the state court, the judgment upon the record would necessarily have been the same. The correctness of the principles upon which the former judgment was founded was wholly immaterial. Whether correct or not, the state court, by force of the constitutional provision, was bound to credit it—even though

it dissented from the doctrines on which that judgment rested.

The appellate proceedings, in the state supreme court, simply involved an inquiry into the correctness of a decree in equity, rendered by the district court of Lancaster County, Nebraska. Its judgment entered upon the journal was: "That the judgment of said district court be and the same hereby is affirmed" (printed record, p. 127). The decree thus affirmed is found in the printed record at pages 25–29. There is no pretense, in the decree entered by the trial court, of any authority to disregard the former judgment. Findings 9, 10 and 11 expressly recite the proceedings theretofore had in the court of law, and find that this court, on *certiorari*, "held that the defendant was not liable upon said policy, for the reason that it had the right to protect itself against other insurance by the provisions herein quoted, and that the plaintiff was not entitled to recover in said action, for the reason that the court of law, in which said action existed, was without power to grant relief, except in accordance with the letter of said contract; that said action so pending in the Circuit Court of the United States, as herein described, was a suit at law and not in equity." Upon the facts so found, the trial court expressed the opinion: "The action first commenced and prosecuted to a conclusion in the federal court was not a bar to the present action, the true test being that the two actions must be so utterly inconsistent that the choice of one necessarily operated to renounce the other. The remedy sought in the action at bar and the former proceeding are not repugnant to each other. They are not inconsistent. Plaintiff asked for something in the first instance that the court was powerless to grant, and, under the pleadings, plaintiff can not be construed to have elected to affirm the contract as originally written"

(printed record, pp. 28–29, conclusion of law No. 1). It is thus demonstrated that the question presented, by this record, to the supreme court was: Did the previous judgment at law bar the prosecution of this suit in equity? Upon this question we have heretofore endeavored to justify the ruling of the state court; and, we submit, the hearing here ought not to be embarrassed by the consideration of questions not shown upon the record.

VI.

The record does not raise the point that the statute (Neb. Code Civ. Pro., sections 5, 10) impairs the obligation of the contract, and is, for that reason, violative of article 1, section 10, of the Constitution.

The statute antedates the contract by more than thirty years.

The purpose of the constitutional provision is to protect subsisting contracts from impairment by legislative acts, enacted after they became operative; and it can not apply where the contract, alleged to be impaired, was not made till after the enactment of the act questioned.

The eighth assignment of error (printed record, p. 147) presents the claim that the statute of limitations of Nebraska, as construed in this case, impairs the obligation of the contract between the parties, and is, therefore, violative of article 1, section 10 of the constitution, prohibiting any state from passing any law impairing the obligation of contracts.

The constitutional provision is the adoption, as a part of the fundamental and paramount law, of the rule that a contract, which is valid when made, can not be rendered invalid by subsequent legislative enactments. By force of this provision all *existing* contracts, valid when made, are

necessarily exempted from the operation of any special or general legislative acts of the states, touching their subject matter. Failure to observe this rule, by respecting the sacredness of *existing contracts*, violates the constitution and renders the legislative act void. Such seems to be the obvious meaning of the clause protecting contracts from impairment, as well as the interpretation persistently held by this court.

But the act questioned here, in the form in which it now exists, was passed by the legislature of 1886 (Revised Stats. Neb., 1866, Code Civ. Pro., sections 5, 10; General Stats. Neb., 1873, Code Civ. Pro. sections 5, 10; Compiled Stats. Neb., 1891, and subsequent biennial editions, same subdivision references). The contract alleged to be impaired had not then been made; it bears date December 31, 196—, a period of more than thirty years subsequent to the enactment of the statute (Ex. 6, printed record, p. 62).

On such facts, what is the rule? All persons must take notice of the public laws and conform thereto; and if, on entering into a contract, a provision is employed which is repugnant to a public law *then in force*, it is the unlawful clause in the contract, and not the statute, which must yield. In such case, it is the will of the law-making power of the state, and not that of the individual making a subsequent contract, which is paramount. Otherwise, the state would be without power to promulgate general rules touching any matter which may be the subject of contract. For individuals might *subsequently* contract contrary to the terms of the public statute, and by invoking the constitutional provisions against impairment of contracts, overthrow the *previously* enacted statute, in order to uphold the contract. The will of the individual, by such a construction, would

thus be made paramount to that of the legislature; and the powers of local government, reserved by the constitution to the states, would be annihilated. This court, however, has not construed the constitutional provision in question to thus cripple the legislative power of the state. By repeated decisions, cited below, it has held the construction stated in the headnotes. It is needless, therefore, to prolong the argument further than to refer to the decisions, authoritatively settling the issue.

In *Lehigh Water Co. v. Easton*, 121 U. S., 391–392, it was said in the unanimous opinion of the court, delivered by Mr. Justice HARLAN:

"The only question presented by the record which this court can properly consider is, whether the judgment below denies to the plaintiff in error any right or privilege secured by that provision of the Constitution of the United States which declares that 'No state shall pass any law impairing the obligation of contracts.' Obviously, this clause can not be invoked by the reversal of the judgment below. It is equally clear that the law of the state, to which the Constitution refers in that clause, must be one enacted *after* the making of the contract, the obligation of which is claimed to be impaired. . . . But the claim is, that the exclusive privilege acquired by the company under the statute of 1874 was impaired in value by the acts passed in 1867. It can not, however, with propriety, be said that the obligation of a contract made with the state in 1874 was impaired by statutes enacted in 1867. Whether the former repealed, by implication, the acts of 1867, presents no question arising under the National Constitution. That is a question simply of statutory construction which the state court was competent to determine, and whose judgment in respect thereto is not subject to re-examination in this court. Had the borough of Easton been authorized by a statute enacted *after* the Leigh Water Company had acquired the exclusive privilege given by the act of 1874, then this court would have been compelled to decide, upon its independent judgment, whether the latter applied only to private corporations;

for, in such case, the determination of that question would be involved in the inquiry whether there was a contract between the state and the company, and, if there was a contract, whether its obligation was impaired by a law subsequently enacted. *Louisville Gas. Co. v. Citizens' Gas. Co.*, 115 U. S., 683, 697.

"The argument in behalf of the company seems to rest upon the general idea that this court, under the statutes defining its appellate jurisdiction, may re-examine the judgment of the state court in every case involving the enforcement of contracts. But this view is unsound. The state may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold a contract void which, in our opinion, is valid; it may adjudge a contract to be valid which, in our opinion, is void; or its interpretation of the contract may, in our opinion, be radically wrong; but, in neither of such cases would the judgment be reviewable by this court, under the clause of the Constitution protecting the obligation of contracts against impairment by state legislation, and under the existing statutes defining and regulating its jurisdiction, unless that judgment, in terms or by its necessary operation, gives effect to some provision of the state constitution, or some legislative enactment of the state, which is claimed by the unsuccessful party to impair the obligation of the particular contract in question. *Railroad Company v. Rock*, 4 Wall., 177, 181; *Railroad Company v. McClure*, 10 Wall., 511, 515; *Knox v. Exchange Bank*, 12 Wall., 379, 383; *Delmas v. Ins. Co.*, 14 Wall., 661, 665; *University v. People*, 99 U. S., 309, 319; *Chicago Life Ins. Co. v. Needles*, 113 U. S., 574, 582."

In *Bacon v. Texas*, 163 U. S., 216, Mr. Justice PECKHAM, delivering the unanimous opinion of this court, said:

"Where the federal question, upon which the jurisdiction of this court is based, grows out of the alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired, within the meaning of this clause of the constitution, so as to give this court jurisdiction on a writ of error to the state court, by some *subsequent* statute of the state, which has been upheld or

effect given it by the state court. *Lehigh Water Co. v. Easton*, 121 U. S., 388; *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.*, 125 U. S., 18; *Central Land Co. v. Laidley*, 159 U. S., 103–109."

In the same case (163 U. S., 220) Mr. Justice PECKHAM, answering the suggestion that the construction of statutes by the court of Texas, theretofore obtaining, had become a general rule of property, said:

"The construction of the general law, which has been thus given by the courts, upon the question of what was a sufficient survey, it is claimed, had become a rule of property, which parties were entitled to rely upon and which no court could overturn, and if it did so the contract was impaired and the judgment was reviewable by this court. The proposition can not be maintained as a basis for giving this court jurisdiction upon writ of error to the state court. It ignores the limits to our jurisdiction in this regard, which, as has been seen, is confined to legislation which impairs the obligation of a contract."

In the same opinion (163 U. S., 221) the right of this court, in the circumstances related in the last above quotation, to follow the previous construction of the state court in suits originating in a Circuit Court of the United States, was stated with the following expressed qualifications:

"But effect is given to it (former construction of the statutes) by this court, only on appeal from a judgment of a United States court, and not from that of a state court. This court has no jurisdiction to review a judgment of a state court, made under precisely the same circumstances, although such state court thereby decide that the state legislation was void, which it had prior thereto held to be valid. It has no such jurisdiction, because of the absence of any legislation *subsequent* to the issuing of the bonds which had been given effect by the state court. In other words, we have no jurisdiction because a state court changes its views in regard to the proper construction of its statute, although the effect of such judgment may be to impair the

value of what the state court had before that held to be a valid contract."

In *Railroad Co. v. Rock*, 4 Wall., 181, Mr. Justice MILLER, in the opinion of the court, said:

"The whole case, in the language of the brief, is put upon the ground that the 'supreme court of Iowa has made a decision in this case which impairs the obligation of contracts'; and the argument goes upon the fundamental error that this court can, as an appellate tribunal, reverse the decision of a state court, because that court may hold a contract to be void, which this court might hold to be valid. If this were the law, every case of a contract held by the state court not to be binding, for any cause whatever, can be brought to this court for review, and we should thus become the court of final resort, in all cases of contract, where the decisions of state courts were against the validity of the contracts set up in those courts. This obviously was not the purpose of the judiciary act. It must be the constitution, or some law of the state, which impairs the obligation of the contract, or which is otherwise in conflict with the constitution of the United States."

In *Knox v. Exchange Bank*, 12 Wall., 383, Mr. Justice MILLER said in the opinion:

"But we are not authorized by the judiciary act to review the judgments of the state courts because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state court could be brought here when the party, setting up a contract, alleged that the court had taken a different view of its obligation to that which we held."

The prior decisions of this court, above cited, definitely settle, in favor of defendant in error, the issue under consideration. Within the meaning of the constitutional provision in question, a contract can only be impaired by a legislative act enacted *subsequent* to the making of the con-

tract. Since the contract alleged to have been impaired is shown not to have been made until more than thirty years *after* the passage of the act assailed, the particular question involved in this assignment of error is not raised and can not be considered or adjudged by this court.

The question of the constitutional validity of the State Statute was not litigated in the State court.

While the point, itself, is without merit or gravity, and there is no motive for seeking to avoid the issue, it is proper that we direct attention to the fact that it was not litigated in the state court, and no sufficient foundation is laid for its presentation to this court. *Miller v. State Ins. Co.*, 54 Neb., 121, and *Omaha Fire Ins. Co. v. Drennan*, 56 Neb., 623, following prior cases, had ruled that a stipulation, fixing the period for suing at a shorter time than that fixed by statute, is void because in conflict with the public law. The opinion here simply follows the settled rule of the forum. The main contested issue on the statute of limitations was, whether the statute ran against the primary legal right, in aid of which equity was invoked, or against the specific relief which equity gave. In the one case, the equitable action would lie until the statute would have barred the right on the written contract. In the other, the statute would run independently against the right to specific relief, even though it was sought only in aid of a legal right. That was an interesting question, elaborately argued, before the state courts; but the writ of error does not bring it here for review. The constitutional validity of the statute was not questioned in this case by the answer, paragraph 8 of which expressly pleaded its terms and claimed that the period of five years had elapsed since accrual of the cause of action (printed record, pp. 16, 17). A motion for a new

trial was filed in the district court, which did not assail the constitutional validity of the statute (printed record, pp. 29, 30). An assignment of errors was filed with the record in the State Supreme Court, which did not assail the constitutional validity of the statute (printed record, pp. 3–5). The opinion, responding only to the issues, contained no mention of any constitutional objection to the statute (printed record, pp. 128–134). After final adjudication, plaintiff in error, for the first time, suggested the point in assignment 1 of a motion for a rehearing (printed record, p. 135). By the rules of the State Court, the points not presented at the original hearing were waived. It was not then bound to examine the question, and never, in fact, either examined or ruled upon it. For this reason, under the settled practice of this court, it should decline to entertain the question, because it was waived by plaintiff in error in the state court, and only suggested by motion for a rehearing, after the final adjudication.

It can not be denied that the interpretation, placed by the Nebraska Court on the statute of limitations, is variant from the rules held by this court when interpreting similar statutes; but that circumstance is not material to the questions raised by the assignments of error. This court, upon the present writ of error, sued out to test the correctness of rulings upon federal questions, is not concerned about those issues not involving rights arising under the federal constitution or acts of Congress, and upon which the authority of the state court is unfettered. This and other questions of a local character upon which the authority of the state is final, and upon which the judgment of the State Supreme Court is not here subject to review, would be interesting, if the judgment under review had been rendered in a circuit court of the United States. But, since the judg-

ment is that of a State Supreme Court, it would be undignified and an imposition upon the court, for counsel, on either side, to burden the argument with a discusion of questions involving purely local laws and procedure.

VII.

CONCLUSION.

A critical review of the record, and of the authorities upon the points at issue, leads necessarily to the following conclusions:

1. The only federal question arising on the record is: Did the former suit at law adjudicate and conclude assured upon the cause of action for *reformation*, so that, by denying it such effect, the state court refused the faith and credit due to it under the constitution? This question, upon recognized principles, is capable only of a negative answer. The right to relief by reformation was not within the issues in the prior suit, and the legal forum had not power by its judgments to conclude either party, on that issue, by affirming or denying the right of reformation. Any other holding would be a departure from fundamental rules of jurisprudence, announced by Chief Justice Marshall, the world's greatest jurist, sanctified by time, followed by the states, and never departed from by this court.

2. The suggestion that the Supreme Court of Nebraska denied force to a judgment of this court, because it dissented from the expressed views of this court upon a question of law, has no substance, aside from the mere froth of controversy, and is effectually destroyed by an examination of the record, showing that the decree under review determines only the issue: Did the admittedly valid judgment of this court conclude the assured's right of reformation, asserted

by the bill? The state court could not have ruled that the assured, in view of that judgment, had an adequate remedy at law. By the rule of the forum, assured could have had relief at law, on the facts stated in the bill; but the constitutional requirement that credit be given the former judgment, substituted that judgment for the law of the forum, in this equity suit. The court not only regarded the rule of the constitution; but could not have ruled otherwise, without a denial to the assured of the benefit of the judgment, as an adjudication against its right to relief at law, in which respect defendant by reply specifically counted upon the same judgment.

3. A contract not made till thirty years after passage of the state statute assailed, is not within the protection of the constitutional requirement, that no state shall pass any law impairing the obligation of contracts.

The brief of plaintiff in error does not cite a single case in this court in support of either point argued. For the reasons stated the judgment of the Supreme Court of Nebraska should be affirmed.

Respectfully submitted,

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Lincoln, Neb., April 10, 1906.